SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-786

LLOYD A. FRY ROOFING COMPANY,
A CORPORATION,
Petitioner,

vs

ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, A BODY POLITIC, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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TABLE OF CONTENTS.

PAGE

Opinion Below 1

This Court's Jurisdiction 2

Questions Presented 2

Constitutional Amendments and Statutes Involved 2

Statement of the Case 3

Reasons Why The Writ Should Be Granted 5

I. The Decision Below Conflicts with and Indeed Flaunts the Holdings of This Court in Cases Such as United States v. L. Cohen Grocery, 225 U. S. 81 (1920), Connally v. General Construction Company, 269 U. S. 385 (1926), Cline v. Frink Dairy Company, 274 U. S. 445 (1927), Giaccio v. Pennsylvania, 382 U. S. 399 (1966) and Papachristou v. City of Jacksonville, 405 U. S. 156 (1972) That Statutes as Vague, Indefinite and Uncertain as the Illinois Environmental Control Act Violate Due Process. If the Decision Below Is Permitted to Stand, There Will Be No Guidelines Whatsoever Upon Which Persons May Base Their Conduct So As to Prevent a Conviction for "Air Pollution" Under the Illinios Act and Similar Statutes .. 5

II. Under the Illinois Environmental Protection Act, a Charge of Violation May Be Brought in Criminal Court or in a So-Called "Administrative" Proceeding. But an Administrative Defendant Is Subject to a Greater Monetary Penalty Than a Criminal Defendant Charged with the Same Offense. Yet an Administrative Defendant Is Denied the Right to a Trial by Jury, Denied the Right to a Trial Under the Rules of Evidence and Denied the Right to Proof of Guilt Beyond a Reasonable Doubt. Since the State May Arbitrarily Pick and Choose Between These Two Means of Enforcement, the Act Violates Equal Protection and Due Process 10

III. The Illinois Environmental Protection Act and the Pollution Control Board's Procedural Rules Guarantee That a Defendant Has the Right to Submit Written and Oral Argument. But the Board Here Refused to Permit Fry to Submit Written or Oral Argument and the Appellate Court's Decision Upholding the Board Is in Clear Conflict with the Statute, the Board Rules, the Constitution and the Law of This Court 14

Conclusion 17

Appendix A1

Appendix A:

Lloyd A. Fry Roofing Company v. Pollution Control Board, *et al.* (Appellate Court of Illinois Opinion) A1

Appendix B:

Lloyd A. Fry Roofing Company v. Pollution Control Board, *et al.* (Supreme Court of Illinois Order) A17

Appendix C:

Illinois Environmental Protection Act A19

Appendix D:

Environmental Protection Agency, *et al.* v. Lloyd A. Fry Roofing Company (Illinois Pollution Control Board Opinion) A39

Appendix E:

Environmental Protection Agency, *et al.* v. Lloyd A. Fry Roofing Company (Illinois Pollution Control Board Supplemental Opinion) A48

Appendix F:

Excerpt from Board Hearing A52

Appendix G:

Excerpts from Illinois Pollution Control Board Procedural Rules A53

TABLE OF CITATIONS.

Cases.

Barbier v. Connolly, 113 U. S. 27 (1885) 11

Cline v. Frink Dairy Company, 274 U. S. 445 (1927) .. 7, 9

Connally v. General Construction Company, 269 U. S. 385 (1926) 8

Giaccio v. Pennsylvania, 382 U. S. 399 (1966) 8

Jenkins v. McKeithen, 395 U. S. 411 (1969) 13

Morgan v. United States, 304 U. S. 1 (1938) 15, 17

Mystik Tape v. Illinois Pollution Control Board, 16 Ill. App. 3d 778, 306 N. E. 2d 574 (1973) 7

Papachristou v. City of Jacksonville, 405 U. S. 156 (1972) 8

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 (1922) . 14

People v. Harter, 86 Ill. App. 2d 461 (1967) 12

People v. Sweetland, 210 Ill. App. 432 (1918) 12

Rasche v. Board of Trustees, 353 F. Supp. 973 (N. D. Ill. 1972) 9

Small Co. v. American Sugar Refining Co., 267 U. S. 233 (1925) 8

Truax v. Corrigan, 257 U. S. 312 (1921) 11

United States v. L. Cohen Grocery, 255 U. S. 81 (1920) 6, 7, 9, 10

Constitutional Provisions.

United States Constitution:
Amendment XIV 2

Federal Statutes.

28 U. S. C. § 2001 2
28 U. S. C. § 1257(3) 2

Illinois Statute.

Illinois Environmental Protection Act (Ill. Rev. Stats., ch. 111½, §§ 1001, *et seq.*) 3, 6, A19-38
Illinois Criminal Code (Ill. Rev. Stats., ch. 38, § 17(j)) .. 12

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Lloyd A. Fry Roofing Company petitions for a Writ of Certiorari to review the decision of the Appellate Court of Illinois entered on May 28, 1974, and the Order of the Supreme Court of Illinois entered on September 27, 1974, denying Fry's petition for leave to appeal from the Appellate Court decision.

OPINION BELOW

The Appellate Court decision is reported at 20 Ill. App. 3d 301 and is reprinted in full as Appendix A to this Petition. The Illinois Supreme Court rendered no opinion and its Order denying the petition for leave to appeal is not reported. The Clerk's notice of the entry of said Order is reproduced as Appendix B to this Petition.

THIS COURT'S JURISDICTION

The Illinois Supreme Court denied Fry's petition for leave to appeal on September 27, 1974 and this Petition is filed within ninety days thereafter pursuant to 28 U.S.C. § 2101. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Are sections 9(a), 3(b) and 3(d) of the Illinois Environmental Protection Act (Ill. Rev. Stats., ch. 111½, §§ 1009(a), 1003(b) and 1003(d)), including the prohibition therein against "unreasonably interfer[ing] with the enjoyment of life or property", so vague, indefinite and uncertain as to violate due process?

2. Does the Illinois Environmental Protection Act deny equal protection and due process by permitting the State to arbitrarily choose between enforcement in a criminal proceeding or in a proceeding which is denominated as "administrative", but is literally identical in substance and effect to a criminal proceeding except that an "administrative" defendant is denied substantial rights guaranteed to a criminal defendant?

3. Does an administrative Board deny due process when it convicts and fines a defendant without giving it the opportunity to submit argument as guaranteed by Statute, by the Board's own Rules and by decisions of this Court?

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

"Amendment XIV . . . Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ch. 111½ Ill. Rev. Stats.

"§ 1009. Acts prohibited. § 9. No person shall:

(a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;"

. . .

"§ 1003. Definitions. § 3. . .

(b) 'Air Pollution' is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property."

. . .

"(d) 'Contaminant' is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source."

STATEMENT OF THE CASE

Petitioner Lloyd A. Fry Roofing Company (herein sometimes called "Fry") is a manufacturer of roofing materials. In February of 1971, Fry was charged with air pollution, in alleged violation of the newly enacted Illinois Environmental Protection Act, before the newly created Illinois Pollution Control Board. Prior to the commencement of the Board proceeding, an action had been filed in Circuit Court by the State's Attorney of Cook County also charging Fry with air pollution, this in alleged violation of a County ordinance. A Consent Decree was subsequently entered in the County action by which Fry denied any violation of law, but agreed nonetheless to install control equipment. The Consent Decree was submitted to the Board along with a request by Fry that the administrative proceeding be dismissed. The Board ignored that request and the hearings continued.

The hearings were held before a Hearing Officer appointed by the Board. They resulted in a record containing more than 900 pages of testimony and numerous, lengthy documents.

Under the Environmental Protection Act and Board Rules, the Hearing Officer is not to provide a summary or report concerning the evidence or the case. In fact, he is to take no part at all in the decision-making process. He is, however, required to set a schedule for the parties to submit written briefs to the Board "after the close of the hearing[s]". He did so in this case (Appendix F hereto). A request for oral argument was also made after the close of the hearings, pursuant to the Act and Rules. But the Board refused to await written briefs and refused to hear oral argument. Rather, ignoring those guaranteed rights, it held Petitioner in violation of the Statute and emission regulations, entered a cease and desist order and imposed a $50,000 fine (Appendix D hereto).

Fry appealed the Board's decision to the Illinois Appellate Court. There Fry argued that the Act violated the due process and equal protection guarantees contained in the Illinois and United States Constitutions, that it unconstitutionally permitted the Board to exercise the legislative and judicial powers, that the Board had denied Fry its constitutional and statutory right to submit argument, that the Hearing Officer was biased and the hearings unfair and that there was no competent or material evidence which could support the Board's decision.

The Appellate Court, however, affirmed the Board's finding of statutory violation and its imposition of a fine. In so holding, the Court virtually ignored the proposition that the Act is unconstitutionally vague and uncertain. Indeed, the Court held that the Board could convict one of a statutory violation by begetting its *own* language and applying it in lieu of the statutory provisions.

The Appellate Court also held that a State may create an administrative Board to hear the same charges as might be heard by a criminal court and jury. In fact the Board may im-

pose a higher fine than a criminal court. Yet, a defendant before the Board is denied the safeguards guaranteed to a criminal defendant.

And the Appellate Court further held that, notwithstanding specific language to the contrary contained in the Statute, the Board's own Rules and the law of this Court, an administrative defendant may be convicted and fined without the opportunity to submit argument.

Notwithstanding the devastating impact of these holdings upon future proceedings, as well as this defendant, the Illinois Supreme Court refused to consider the matter and denied Fry's petition for leave to appeal. Certiorari is sought before this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The Decision Below Conflicts with and Indeed Flaunts the Holdings of This Court in Cases Such As United States v. L. Cohen Grocery, 255 U.S. 81 (1920), Connally v. General Construction Company, 269 U.S. 385 (1926), Cline v. Frink Dairy Company, 274 U.S. 445 (1927), Giaccio v. Pennsylvania, 382 U.S. 399 (1966) and Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) That Statutes As Vague, Indefinite and Uncertain As The Illinois Environmental Control Act Violate Due Process. If the Decision Below Is Permitted to Stand, There Will Be No Guidelines Whatsoever Upon Which Persons May Base Their Conduct So As to Prevent a Conviction for "Air Pollution" Under the Illinois Act and Similar Statutes.

The Illinois Appellate Court affirmed an administrative decision that Fry had violated Sections 9(a) and 3(b) of the Illinois Environmental Protection Act.* But, as Fry argued before the Illinois Courts, these provisions clearly fail to meet due process.

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* Ill. Rev. Stats., ch. 111½, §§ 1009(a) and 1003(b).

Section 9(a) of the Act provides that:

> "No person shall: (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause *air pollution* in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;" (emphasis supplied)

Section 3(b) defines "Air Pollution" as:

> ". . . the presence in the atmosphere of one or more *contaminants* in *sufficient* quantities and of *such* characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, *or to unreasonably interfere with the enjoyment of life or property*." (emphasis supplied)

Section 3(d) defines a "contaminant" as:

> ". . . any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source."

Surely such vague and indefinite language violates the well-settled requirements for a valid statute.

In *United States* v. *L. Cohen Grocery*, 255 U.S. 81 (1920), this Court held that the so-called Lever (or Food Control) Act was unconstitutionally vague. Much like the Illinois statute, the Lever Act made it unlawful "to make any unjust or unreasonable rate or charge" and Petitioner submits that this Court's language is dispositive here:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that

> the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." (255 U.S. at p. 89.)

Similarly, in *Cline* v. *Frink Dairy Company,* 274 U.S. 445 (1927), this Court struck down a Colorado antitrust statute which provided that combinations otherwise illegal would be exempted from the act if they conducted operations "at a reasonable profit". Citing *L. Cohen Grocery* for the proposition that a standard of "reasonable" was so vague and uncertain that it necessarily violated due process, this Court went on to say:

> " 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . .' " (274 U.S. at p. 459.)

As the Illinois Appellate Court has held in another case, the Environmental Protection Act creates a new offense (*Mystik Tape* v. *Illinois Pollution Control Board,* 16 Ill. App. 3d 778, 306 N.E. 2d 574 (1973)).

Decisions similar to *L. Cohen Grocery* and *Cline* v. *Frink Dairy* are legion and include cases such as *Connally* v. *General*

Construction Company, 269 U.S. 385 (1926), *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), where Mr. Justice Douglas stated:

> "This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . and because it encourages arbitrary and erratic arrests and convictions." (405 U.S. at p. 162.)

Nor does it matter that the Illinois Act might be characterized as imposing a civil rather than a criminal penalty where a charge of violation is made before the Board. This Court has repeatedly held that whether statutes be civil or criminal, they must all be construed within the framework of the constitutional right to due process—*they must give fair warning of the proscribed conduct.* As this Court stated in *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925):

> "The defendant attempts to distinguish those cases because they are criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." (267 U.S. at p. 239.)

Petitioner submits that a statute which proscribes conduct with words like "tend to cause air pollution . . . either alone or in combination with contaminants from other sources" and "contaminants in sufficient quantities and of such characteristics . . . as to be injurious to human, plant, or animal life, to health or to property" is void for vagueness. No statute may properly contain prohibitions such as "threaten", "allow", and "tend to cause" or define "contaminant" so broadly as to literally forbid breathing. And of critical importance here, this statute states and the Appellate Court held that one may be convicted if he

has "*unreasonably interfere[d] with the enjoyment of life or property*", the *very* language which this Court held to be unconstitutionally vague in *L. Cohen Grocery* and *Cline* v. *Frink Dairy Company*.

There can be imagined no more eloquent proof of the invalidity of this Act than the opinion of the Pollution Control Board below. The Board said that it need only determine ". . . whether Fry's operation *substantially* interfered with the enjoyment of life and property . . ." (Appendix D, p. A44). But the Act does not contain the term "substantially" interfered. The statutory standard, such as it is, is "unreasonably" interfered and even the Appellate Court said the Board had misapplied the Act (Appendix A, p. A14). As a three judge Federal Court recently noted, while voiding a statute which provided for the termination of aid to college students "convicted . . . of any crime . . . of a *serious* nature and [which] contributed to a *substantial* disruption . . .":

> "It may be urged that the hearing officer simply misapplied the language of the statute, but vague language is suspectible of subjective interpretation or complete misinterpretation. This is precisely why penal or punitive statutes must be sufficiently precise as to give fair notice to persons whose actions may be subject to them as well as to provide effective standards for adjudication of their applicability. If a statute is so obscure that men of common intelligence must guess at its meaning or differ as to its applicability, it is unconstitutionally vague". (*Rasche* v. *Board of Trustees*, 353 F. Supp 973, at p. 977 (N.D. Ill. 1972).)

The Illinois Environmental Protection Act is so vague and obscure that "men of common intelligence" could not possibly do more than "guess at its meaning and differ as to its application"; surely, it fails to inform potential defendants "what conduct on their part will render them liable to its penalties" (*Cline* v. *Frink Dairy Company, supra,* at p. 459). As stated above, this Court has *specifically* held that the *very* prohibitions which formed the basis for Fry's conviction are unconstitutionally

vague. Fry cited and argued those decisions to the Illinois Courts. But the Illinois Courts ignored those decisions. Rather, the Appellate Court cited an Illinois case completely irrelevant to this Act and the statutes of three other States which it said were similar to the one at bar (Appendix A, pp. A7-8).

If the decision below is permitted to stand, one may now be found guilty of "pollution" at the unfettered whim of a State court or administrative board. Unless it is set aside, States may now blithely ignore this Court's oft repeated admonition that statutes must be sufficiently precise so that persons subject thereto may intelligently guide their conduct. Unless review is granted by this Court, the Illinois Environmental Protection Act and "similar" statutes may now be used to conduct "the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against." (*United States* v. *L. Cohen Grocery, supra,* at p. 89). Petitioner earnestly prays that its Petition be allowed.

II.

Under the Illinois Environmental Protection Act, a Charge of Violation May Be Brought in Criminal Court or in a So-Called "Administrative" Proceeding. But an Administrative Defendant Is Subject to a Greater Monetary Penalty Than a Criminal Defendant Charged with the Same Offense. Yet an Administrative Defendant Is Denied the Right to a Trial by Jury, Denied the Right to a Trial Under the Rules of Evidence and Denied the Right to Proof of Guilt Beyond a Reasonable Doubt. Since the State May Arbitrarily Pick and Choose Between These Two Means of Enforcement, the Act Violates Equal Protection and Due Process.

As Petitioner argued below, one of the most critical defects in the Illinois Environmental Protection Act involves the dual

method of enforcement contained therein. As this Court held in the leading case of *Barbier* v. *Connolly*, 113 U.S. 27 (1885):

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; *that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.*" (113 U.S. at p. 31, emphasis supplied.)

And, in *Truax* v. *Corrigan*, 257 U.S. 312 (1921):

> "Thus, the [equal protection] guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so."
>
> . . .
>
> " 'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*' " (257 U.S. 333, emphasis by the Court.)

But the Illinois Act clearly violates these well settled maxims. Thus, Section 1042 permits a charge of statutory violation to be brought before the Pollution Control Board which can impose a fine of up to $10,000 for each violation and $1,000 more for each additional "day of violation". On the other hand,

Section 1044 states that it shall be a misdemeanor to violate the Act. A misdemeanor is a crime (*People* v. *Harter*, 86 Ill. App. 2d 461 (1967); *People* v. *Sweetland*, 210 Ill. App. 432 (1918)) and where, as here, the statute is silent as to the criminal penalty, a defendant may receive a maximum fine of $1,000, and/or up to one year in jail. (Ill. Rev. Stats., ch. 38, § 17(j)).

Yet no basis for such a distinction between the two methods for charging violation appears anywhere in the Act. Of course, one who is charged with a misdemeanor has the right to a trial by jury. He also has the right to a fair trial under the rules of evidence, a burden of proof beyond a reasonable doubt and numerous other guarantees not available to a defendant charged before the Board. And while the Board cannot imprison, it may, unlike a criminal court, order one to cease and desist. Both may impose a monetary penalty, the Board being empowered to impose a fine far in excess of that which could be imposed by a criminal court. Obviously, there is a difference in burdens between persons thus differently charged with the same offense. The fact that the State may arbitrarily pick and choose between these two procedures, so widely different in terms of their guaranteed rights, but both giving rise to substantial penalties, is a clear violation of equal protection and due process. The Illinois Appellate Court either misapprehended or ignored Petitioner's argument in this regard, for its sole answer appears to be that the Act *says* proceedings may be brought before the Board (Appendix A., p. A9). This is precisely why the Act violates the Constitution.

And since the same charges may be brought before the Board or in criminal court, a defendant charged before the Board must surely be permitted the same right to a jury trial as one charged with a crime. A criminal defendant could not be denied a trial by jury because he might have been charged with the same offense before the Board. The Appellate Court, however, looked only to form, not substance, stating that the "right to

trial by jury was never intended to apply to administrative proceedings." (Appendix A, p. A10.) But this was not the ordinary administrative proceeding involving licensing, rate-making or the like. This proceeding was literally identical in substance and effect to a criminal proceeding under the Act.

As Mr. Justice Black said, concurring with a decision of this Court striking down a statute which created a commission to investigate violations of labor-management law:

> "The Louisiana law here . . . is, in my judgment, nothing more nor less than a scheme for a nonjudicial tribunal to charge, try, convict, and punish people without courts, without juries, without lawyers, without witnesses—in short without any of the procedural protections that the Bill of Rights provides. . . . For these reasons I believe that the Louisiana law denies due process of law." (*Jenkins* v. *McKeithen*, 395 U. S. 411, at pp. 432-33 (1969).)

So too, the Illinois Environmental Protection Act has created "nothing more nor less than a scheme for a nonjudicial tribunal to . . . try [and] convict . . . without courts, without juries . . . [and] without . . . the procedural protections that the Bill of Rights provides." The Board here decided an obvious adversary proceeding. It convicted Fry of statutory violation and ordered it to cease and desist. It *fixed* and imposed a $50,000 penalty. The substance of such a proceeding simply cannot be determined on the basis of a label ascribed by a State legislature or Appellate Court.

Petitioner submits that if the decision below is permitted to stand, States are free to provide that any charge at all may now be heard by a nonjudicial "administrative" tribunal, instead of a court and jury. But Petitioner also submits that the Constitution cannot and does not permit the elevation of labels over substance and the denial of substantial rights so that a State may "expedite" a socially prominent cause.

As government regulation of all walks of life increases, the words of Mr. Justice Holmes bear repetition:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, at p. 416 (1922).)

For the reasons set forth above, this Court should grant review.

III.

The Illinois Environmental Protection Act and the Pollution Control Board's Procedural Rules Guarantee That a Defendant Has the Right to Submit Written and Oral Argument. But the Board Here Refused to Permit Fry to Submit Written or Oral Argument and the Appellate Court's Decision Upholding the Board Is in Clear Conflict with the Statute, the Board Rules, the Constitution and the Law of This Court.

Perhaps no single aspect of the Appellate Court's decision so clearly violates guaranteed rights as its holding that Fry could be denied the opportunity to submit argument to the Pollution Control Board.

The Environmental Protection Act itself is unquestionably to the contrary. Thus, Section 1032 specifically provides that "Any party to a [Board] hearing . . . may make oral or written argument . . .", while Section 1033(a) states that the Board may decide the case only "[a]fter due consideration of the written and oral statements . . ." (Appendix C, pp. A33-34). Moreover, could there remain any doubt that a defendant has the right to at least submit a written brief, the Board's own procedural Rules mandate without equivocation that:

> *"The parties may submit written briefs to the Board within ten days after the close of the hearing, or such other reasonable time as the Hearing Officer shall determine* consistent with the Board's responsibility for expeditious decision. Upon request at the time of submission of briefs or on its own motion, the Board may permit oral argument by the parties before the whole Board." (Illinois Pollution

Control Board Procedural Rules § 330, 1970, emphasis supplied.)

While it could perhaps be suggested that oral argument is discretionary (although Petitioner submits that this too would be both unconstitutional and contrary to the Act), it is perfectly clear that the right to file a *written* brief simply cannot be denied. Indeed, Rule 330, above, *requires* the Hearing Officer to set a briefing schedule. The Hearing Officer here *did* set a briefing schedule (Appendix F, p. A52), but the Board ignored this, as well as the Statute and Rules, deciding the case before briefs could be filed. And when Fry objected in its motion for rehearing, the Board replied with near incredible arrogance:

> "The Board *chose* not to await the filing of briefs for the rendering of its decision, but took the case on the record .... Likewise, the Board *chose* to proceed without hearing oral argument." (Appendix E, p. A49, emphasis supplied.)

But the *Board* cannot *"choose"* to proceed without briefs and it cannot *"choose"* to foreclose oral argument. As stated above, those rights are clearly guaranteed by Statute and Board Rule. Of even more importance, they are also guaranteed by the Constitution and the law of this Court.

Thus, in the so-called "second" Morgan case (*Morgan* v. *United States*, 304 U.S. 1 (1938), this Court reviewed a proceeding in which an administrator, much like the Board here, read, but did not hear, a written transcript of evidence. He also read (but did not hear) a transcript of defendants' oral argument and reviewed their written briefs. But, the Government made no formal argument at all. Rather, its prosecutors conferred with the administrator outside the presence of defendants who, of course, had no opportunity to reply. Accordingly, this Court reversed the administrative decision and held that due process is *only* satisfied if (1) the decision-maker physically hears the evidence *and arguments* of both parties and decides the case on the spot; (2) the decision is made *after*

both parties have the opportunity to submit proposed findings *and arguments;* or (3) the hearing examiner were to prepare a report to be used as a basis for subsequent exceptions *and argument* by the parties.

While we do not suggest that the sort of collusion described in *Morgan* occurred below, that decision nonetheless highlights the manifest injustice of this proceeding. Under the Illinois Act, the Hearing Officer plays no part in the decision making process. Indeed, he has no duties except to "conduct" the hearings and to rule upon matters which do *not* go to the merits of the case. Only the Board may rule on substantive matters; only the Board may decide the case. (Illinois Pollution Control Board Procedural Rules §§ 308(f) and 315, 1970; Appendix G, p. A53.) But unless a member of the Board attends the hearings, and none did here, its decision is made only on the basis of the raw written record and without any knowledge of such critical factors as credibility, bias, attitude and demeanor. Since the Hearing Officer supplies no summary or analysis and makes no recommendations, the Board is all but completely isolated from the hearing. These, no doubt, are some of the very reasons why the Statute and Rules specifically give parties the right to submit written and oral argument and require that the Hearing Officer set a schedule for "the parties . . . [to] submit written briefs to the Board . . . *after the close of the hearing[s]*". Should those rights be denied in light of this Statute, due process has surely failed.

But the Illinois Courts ignored the foregoing propositions and held that Fry could be denied the right to submit argument to the Board. To the extent that the Appellate Court appears to suggest that due process is satisfied merely by a "hearing" with counsel present, it has tortured the Statute and Board Rules beyond recognition. Moreover, it has clearly denied due process as defined by this Court. As stated above, the Hearing Officer who presides at the hearings has nothing to do with the Board's decision; "argument" to him concerning the merits would be

useless. Furthermore, as the Statute, the Rules and second *Morgan* obviously recognize, argument on the merits is impossible until the hearings have been concluded. Any "argument" *during* a hearing necessarily concerns matters such as evidence, procedure and the like in the heat of trial. It is not the same as and indeed has nothing to do with the guaranteed right to argue the case as a whole to the Board *"after the close of the hearing"* (Illinois Pollution Control Board Procedural Rules § 330, 1970)) and after at least a minimum opportunity to review the evidence and the law. This much, at least, is surely required by due process.

The decision below has resulted in a grave miscarriage of justice with respect to this Petitioner. But more than that, the decision will permit still other State administrators and courts to ignore clear statutory language and thereby deny unpopular defendants due process, as guaranteed by the Constitution and this Court. Petitioner submits that the Constitution must prevail over the passions of a socially prominent cause, and a desire to quickly convict, no matter what the law. For these reasons too, this Petition should be allowed.

CONCLUSION

Petitioner respectfully prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

56629

LLOYD A. FRY ROOFING COMPANY, a corporation,
Petitioner,
vs.
POLLUTION CONTROL BOARD, ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, a body politic, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH, et al.,
Respondents.

} Petition for Review from the Pollution Control Board.

MR. JUSTICE STAMOS delivered the opinion of the court.

This is a petition for review of an order of the Pollution Control Board.[1] The Board denied petitioner Fry Roofing Company (hereinafter Fry) a variance from the Environmental Protection Act,[2] found that Fry has caused air pollution as defined by Sections 3(b) and 9(a) of the Act[3] and has emitted particulates into the atmosphere in an amount exceeding the limits set forth in the Rules and Regulations Governing the Control of Air Pollution. The Board ordered Fry to cease and desist the emission of particulates, and assessed a penalty against Fry in the amount of $50,000 for violation of the Act and the Rules and Regulations.

On appeal Fry contends that: 1) the Environmental Protection Act is unconstitutional in that: (a) it is vague and in-

1. Ill. Rev. Stat. 1971, ch. 111½, par. 1041; Ill. Rev. Stat. 1971, ch. 110A, par. 335.

2. Ill. Rev. Stat. 1971, ch. 111½, par. 1001 et seq.

3. Ill. Rev. Stat. 1971, ch. 111½, pars. 1003(b), 1009(a).

definite; (b) unlimited discretion and legislative power is delegated to the Pollution Control Board; (c) the Act confers judicial power upon an administrative agency; (d) application of the Act results in a denial of equal protection of law; and (e) the Act denies the right to a jury trial; 2) the hearing was unfair in that: (a) the Board did not "hear" the evidence because the Board members are not required to attend the hearing; (b) the hearing officer did not comply with his duty to exclude immaterial and prejudicial evidence as required by the Act; (c) the hearing officer was not impartial; and (d) Fry was denied its right to submit a brief and argument before the Board; and 3) the decision of the Board is not supported by competent, sufficient evidence.

Fry is one of the world's largest manufacturers of asphalt roofing operating 24 plants in various parts of the United States. The facility involved in the present proceeding is located in Summit, Illinois. The Vollney Felt Mill occupies the same premises, supplying the felt used in the operation. The Trumbull Asphalt Company, while purportedly being a separate entity unconnected with Fry, is located contiguous to the Fry plant in Summit as it is in other parts of the country where Fry plants are located, and supplies the asphalt used in Fry's manufacturing process.

On January 7, 1971, Fry filed a petition for a variance from the provisions of the Environmental Protection Act. The petition stated that Fry had installed no control equipment because of possible relocation problems caused by the proposed South-West Expressway. On February 26, 1971, a complaint was filed before the Pollution Control Board by members of a community group known as S.O.R.E.[4] The complaints alleged

4. At the time of the filing of this complaint, another cause was pending in the Circuit Court of Cook County against Fry. (County of Cook v. Lloyd A. Fry Roofing Co., Inc. 71 Ch. 585.) A consent order, in which Fry agreed to install emission control equipment, was entered in that suit before the termination of the instant hearing before the Board.

"that Respondent Fry did, on February 17, 1971, cause and allow the discharge and emission into the environment of contaminants so as to cause or tend to cause air pollution in Illinois, and further that Respondent Fry has engaged and continues to engage in a pattern of conduct such as to cause and allow the discharge and emission into the environment of contaminants so as to cause or tend to cause air pollution in Illinois." Such allegations clearly allege violations of Section 9(a) of the Act and inform Fry of the manner of the alleged pollution. However, the complaint does not allege violations of the Rules and Regulations promulgated by the Board.

Section 31 of the Act[5] requires that the complaint state "the manner in, and the extent to which such person (the person complained against) is said to violate this law." Notice to the alleged violator is a fundamental element of due process. Charges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law, but the charges must be sufficiently clear and specific to allow preparation of a defense. (*Greco* v. *State Police Merit Board,* 105 Ill. App.2d 186, 245 N.E.2d 99.) Section 31 requires notice of a specific violation charged and notice of the specific conduct constituting the violation. See *Citizens Utilities Co.* v. *Pollution Control Board,* 9 Ill.App.3d 158, 289 N.E.2d 642. In addition P. C. B. Procedural Rule 304(c)(2) requires that the complaint contain "a concise statement of the facts upon which the respondents are claimed to be in violation."

In the instant case the complaint did not allege violations of the Rules and Regulations Governing the Control of Air Pollution. Therefore, the Board improperly found Fry in violation of the Rules and Regulations, and we reverse that part of the Board's order. We do not believe that this defect was cured by the facts that the hearing on Fry's petition for a variance from the Rules and Regulations was consolidated with the enforcement proceedings based upon the complaint, and that

5. Ill. Rev. Stat. 1971, ch. 111½, par. 1031.

Fry introduced evidence regarding its emission rates which are governed by the Regulations. Therefore we will consider only that evidence concerning a violation of Section 9(a) of the Act.

A lengthy hearing covering more than 900 pages in the record was held before the hearing officer. In order to consider defendant's contentions, the testimony and evidence adduced must be summarized. Geddam Reddy, an engineer employed by the Environmental Protection Agency, testified on direct examination that, from a reading of generally accepted treatises on air pollution emission factors, he was convinced that emissions from asphalt roofing companies are carcinogenic and dangerous to human health. He stated that since Fry had no emission control equipment, it was emitting carcinogenic materials. Near the end of the hearing, the hearing officer struck the direct testimony of this witness on the basis that he had never visited the Fry plant and had not inspected it. Reddy was later called by Fry and stated that Fry Exhibit 1, United States Environmental Protection Agency Manual (1971 preliminary draft), was a generally accepted emission standard manual.

Ronald Kluszewski, a trustee of the Village of Summit, testified as to the contents and background of a resolution passed by the trustees on January 18, 1971, requesting a denial of Fry's variance application, and also requesting that Fry be required to comply with pollution control laws and regulations. He also testified to complaints from citizens and to his opinion as to public feeling. Finally, he testified that he was able to pinpoint the "obnoxious" odor as emanating from Fry and that it interfered with his enjoyment of his home.

The Summit Chief of Police also testified to complaints regarding the odors emitted by Fry. 63 complaints from 1966 were introduced into evidence; many of these pertained to Trumbull Asphalt Company and did not name Fry. The witness stated that he had gotten approximately 20 complaints per

year since he became chief in 1966; none of these were introduced into evidence.

As Vista volunteer testified to being present at a meeting on December 18, 1970 with Lloyd Fry, Jr. and members of S.O.R.E. Mr. Fry told the group that he knew that he was polluting, but S.O.R.E. could take him to court to make him stop. This witness also testified that his understanding of the law was that Fry would be compensated for control equipment if the plant was condemned for the proposed highway, and that this was discussed at the meeting.

Approximately 12 members of S.O.R.E. then testified. Affidavits from all these witnesses were introduced into evidence. These affidavits related that on February 17, 1971 the affiants observed gray smoke and a sickening odor being emitted from the Fry smokestacks, and that this odor interfered with their enjoyment of their property and environment. Many of these affidavits related incidents prior to February 17, 1971 and subsequent to that date in which the smoke and odor emanating from Fry produced ill effects. One of the affidavits contained newspaper articles reflecting public concern over Fry's operation; two affidavits contained information regarding Fry's operations and lawsuits in three other states. One witness testified that S.O.R.E. has received 111 complaints regarding Fry during December and January of 1971 and 1972. These witnesses were cross-examined extensively by Fry as to their certainty in identifying the source of the odors they attributed to Fry, and as to the contents of their affidavits.

The complainants also called Lloyd Fry, Jr. and Harvey Hoffman, the former Director of Environmental Control at the Fry plant, as adverse witnesses. Fry stated that he did not know what type of particulates the plant was emitting, and did not know of an injunction against the Fry plant in California. Hoffman was questioned regarding the pollution control equipment installed in Fry's other plants.

William Zenisek, an expert witness for the Environmental Protection Agency testified that he visited Fry in 1968 and 1971 and estimated the emissions rate from the United States Environmental Protection Agency Manual, 1968 (E.P.A. Exhibit 1). No tests were conducted on the Fry plant to determine actual emission rates. This witness testified that there is no official update of the 1968 manual, only preliminary revisions. Air Pollution Engineering Manual, U.S. Department of Public Health, 1967 was also introduced into evidence (E.P.A. Exhibit 3) as depicting the state of the art as it relates to asphalt saturators and the control of emissions.

Steven Rosenthal, an environmental protection engineer employed by the Environmental Protection Agency testified that he visited the Fry plant two or three times in 1971, and observed a disagreeable odor. He computed the Fry emission rate from the 1968 Environmental Protection Agency Manual. He stated that in his opinion the wood flour he observed on the premises was the result of a violation. The recommendation of the Environmental Protection Agency, which stated that Rosenthal had made three inspections of the area and had noted a piercing stench, was introduced into evidence. The recommendation also stated that Fry was not complying with Section 9(a) of the Act and Rule 3-3.11 of the Rules and Regulations regarding emission rates. Fry made a motion to call Mr. McCreery of the Agency who purportedly wrote the recommendation; the hearing officer held that Rosenthal signed it and only he was required to testify.

Fry called its plant manager who testified to the saturating process, and stated that to his knowledge "nothing goes out of the stacks," with the exception of steam. He also testified that the stacks did not have hoods to catch emissions, but that the installation of such hoods was planned.

Petitioner's first constitutional argument is that the Environmental Protection Act is unconstitutionally vague and indefinite. Section 9(a) of the Act[6] provides:

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6. Ill. Rev. Stat. 1971, ch. 111½, par. 1009(a).

"No person shall:

> (a) Cause or threaten to allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this act; * * *."

Section 3(b) of the Act[7] states that:

> " 'Air Pollution' is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property."

Section 3(d)[8] states that:

> " 'Contaminant' is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source."

At the outset, we acknowledge that all presumptions are in favor of the constitutionality of legislation (*Gadlin* v. *Auditor of Public Accounts,* 414 Ill. 89, 110 N.E.2d 234), and petitioner has the burden of clearly proving unconstitutionality. Statutes directed at control of pollution in the environment are intended to encompass infinitely variable conditions. Therefore, flexibility and adaptability are required. In addition, the above definitions in this Act, taken together, are clear and easily understandable. All types of contaminants and "pollution" need not be scientifically delineated in a statute of this kind.[9] *Metropolitan Sanitary*

7. Ill. Rev. Stat. *supra,* par. 1003(b).

8. Ill. Rev. Stat. *supra,* par. 1003(d).

9. We note that these sections are as clear as those used in the statutory framework of other states' pollution statutes. See *Houston Compressed Steel Corp.* v. *Texas* (Tex. Civ. App.), 456 S.W.2d 768; *Air Pollution Commission* v. *Coated Material Co.* (Pa. Ct. Comm. Pl.) IERC 1444; *Department of Health* v. *Owens-Corning Fiberglas Corp.,* 100 N.J. Sup. 366, 242 A.2d 21, Affd. 53 N.J. Sup. 248, 250 A.2d 11.

District v. *United States Steel Corp.*, 41 Ill.2d 440, 243 N.E.2d 249.

Petitioner's next contentions are that the Act confers unlimited legislative discretion and judicial power upon the Pollution Control Board. Petitioner's argument that the delegation of authority to interpret the Act and to make rules and regulations is an abdication of legislative responsibility is not persuasive. There is no clear line separating excessive and permissive delegations of legislative authority. A reading of Sections 9(a), 3(b) and 3(d) indicates that the legislature has provided some standards in the Act.

Section 5(b) provides:

> "The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act."

The discretionary power delegate to the Board is clearly limited by the Section 5(b) requirement that the Board determine standards. We are in agreement with the decisions of the courts in *Ford* v. *Environmental Protection Agency*, 9 Ill.App.3d 711, 292 N.E.2d 540, *Bath, Inc.* v. *Pollution Control Board*, 10 Ill.App.3d 507, 294 N.E.2d 778, and *City of Monmouth* v. *Environmental Protection Agency*, 10 Ill.App.3d 823, 295 N.E.2d 136, that the authority and powers bestowed on the Board to make rules and adjudicate cases are in keeping with the spirit of the Environmental Protection Act for the practical application and operation of the Act. See also *Reif* v. *Barrett*, 355 Ill. 104, 188 N.E. 889.

In addition, we hold that the authority to impose monetary penalties granted by Sections 33(b) and 42 of the Act[10] does not constitute a prohibited grant of judicial power.[11] Our

10. Ill. Rev. Stat. 1971, ch. 111½, pars. 1033(b), 1042.

11. The proceeding before the Board was a combination variance *and* enforcement proceeding. Therefore, the Board did not exceed

Supreme Court has recently decided the issue by holding that the discretionary power to impose penalties is reasonably necessary to accomplish the legislative purpose of the agency, and therefore, does not violate the constitutional separation of powers. *City of Waukegan* v. *Environmental Protection Agency*, ... Ill.2d ....., ... N.E.2d ..... (No. 45984 filed March 29, 1974).

Petitioner's final constitutional arguments are that the Act denies it equal protection of law and its rights to trial by jury. Petitioner argues that Section 44 of the Act[12] provides that violations shall constitute misdemeanors, and that, therefore, one person may be charged with a violation before the administrative agency while another person may be charged with the same violation in a criminal proceeding.

The fourteenth amendment requires that all persons subject to legislation "shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed." (*Hayes* v. *Missouri*, 120 U.S. 68, 71-72.) The provisions of the Environmental Protection Act and the regulations of the Board are equally applicable to all persons in Illinois. Petitioner has shown no discrimination or abuse of discretion in bringing administrative actions. On the contrary, the Act provides that enforcement actions be brought before the Board. *Ford* v. *Environmental Protection Agency, supra.* See also *State* v. *Lloyd A. Fry Roofing Co.*, 495 P.2d 751 (Ore. App. Ct.), remanded on other grounds, 502 P.2d 253 (Ore.).

We are also unable to agree with petitioner that the Act is applied in a capricious or arbitrary manner because actions for violation of the Act can be brought against persons, even though

its statutory authority to impose fines in enforcement proceedings. Ill. Rev. Stat. 1971, ch. 111½, pars. 1033(b), 1042. The Board may not impose fines in the context of a variance proceeding. *Citizens Utilities Co.* v. *Pollution Control Board*, 9 Ill.App.3d 158, 289 N.E.2d 642; *City of Mattoon* v. *Illinois Environmental Protection Agency*, 11 Ill.App.3d 259, 296 N.E.2d 383.

12. Ill. Rev. Stat. 1971, ch. 111½, par. 1044.

they may be in compliance with the regulations, and even though Section 49(e) of the Act[13] states that compliance with the regulations is a prima facie defense to an action. It is sufficient to point out that violations of the Act occur whenever a person causes or tends to cause "air pollution" *or* violates the rules and regulations adopted by the Board. (Ill. Rev. Stat. 1971, ch. 111½, par. 1009(a).) Compliance with the regulations is a prima facie defense, but it is not a complete defense.

Petitioner's contention that the Act deprives it of its constitutional right to trial by jury is also without merit. The Constitution of 1970[14] provides that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate." This language is identical to that in the Constitution of 1870, and has been interpreted to secure the right of jury trial as it existed at common law. (*Stephens* v. *Kasten*, 383 Ill. 127, 48 N.E.2d 508.) In the instant case, the Act provides for the creation of an administrative agency to enforce the Act. The constitutional guarantee of right to trial by jury was never intended to apply to administrative proceedings which were unknown at common law, and therefore, petitioner cannot argue that this right has been abridged. *Ford* v. *Environmental Protection Agency, supra.*

Petitioner next argues that the Pollution Control Board's order must be reversed because petitioner was denied a fair and impartial hearing. Due process of law requires that an administrative hearing be fair. (*Smith* v. *Department of Registration and Education*, 412 Ill. 332, 106 N.E.2d 722.) In administrative review, it is our duty to review the manner in which evidence was adduced before the administrative agency. From petitioner's specific allegations of unfairness, we cannot conclude that the administrative hearing in this case was not fair and impartial.

Petitioner asserts that the Act itself precludes a fair hearing because none of the Board members personally hear the evi-

13. Ill. Rev. Stat. 1971, ch. 111½, par. 1049(e).

14. Ill. Rev. Stat. 1971, Const., art. I, § 13.

dence and the hearing officer merely receives the evidence without participating in the decision-making process. The United States Supreme Court has held that in administrative proceedings "there must be a hearing in a substantial sense." (*Morgan* v. *United States*, 298 U.S. 468, 481.) In the instant case, the Act requires the Board to make its determinations after "due consideration of the written and oral statements, the testimony and arguments that shall be submitted at the hearing * * *." (Ill. Rev. Stat. 1971, ch. 111½, par. 1033(a).) Thus we must conclude that the decision-making procedure set forth in the Act conforms to the *Morgan* requirement that "the officer who makes the determinations must consider and appraise the evidence." *Morgan* v. *United States, supra*, at 582; see also *Des Plaines Currency Exchange, Inc.* v. *Knight*, 29 Ill.2d 244, 194 N.E.2d 89.

Petitioner also argues that the hearing was unfair because the hearing officer failed to exclude irrelevant, prejudicial testimony as required by Procedural Rule 320(b). Although we agree that incompetent evidence was admitted into evidence—(we note that evidence was adduced regarding events outside the time scope of the complaint), we are not compelled to conclude that substantial unfairness or an overall denial of justice resulted. The Act requires the Board to file a written opinion stating the facts and reasons for its decision (Ill. Rev. Stat. 1971, ch. 111½, par. 1033(a)), and its decision must be based upon competent evidence. The admission of incompetent evidence is not reversible error if there is substantial evidence to sustain the decision of the Board. See *Yiannopoulos* v. *Robinson*, 247 F.2d 655 (7th Cir.). A failure to observe the technical rules of evidence is not sufficient reason to set aside an agency's decision unless the error materially affects the rights of a party and results in substantial injustice to him. (Administrative Review Act, Ill. Rev. Stat. 1971, ch. 110, par. 275(2).) Our perusal of the record reveals no instance where the ruling of the hearing officer resulted in substantial injustice to Fry.

Likewise, we are not convinced that the hearing officer was biased, and actively participated in proving petitioner's guilt. It is an established principle that the decision of an administrative agency will be set aside if the prejudice or bias of the hearing officer results in an unfair hearing. (*Gigger* v. *Board of Fire and Police Commissioners*, 23 Ill.App.2d 433, 163 N.E. 2d 541.) Upon our review of the record, we are satisfied that the hearing officer conducted the proceedings in a fair and impartial manner. The "expert" testimony of the Agency's engineer, Reddy, was stricken from the record when the hearing officer became aware that Reddy had no personal knowledge of the Fry plant. The hearing officer's instructions to complainant's attorney regarding foundation for a witness's testimony, a letter to the Board stating that the evidence from the Agency would hopefully produce a "knowledgeable expert", the introduction of police reports from 1966, the introduction of testimony regarding community feeling and lawsuits against Fry in other States, the narrative testimony of certain witnesses, and the hearing officer's interrogation of the witnesses are interpreted by us as a conscientious effort by the hearing officer to "insure development of a clear and complete record," as required by the Board's regulations. (Pollution Control Board Regulations, Section 115.) In addition, petitioner was represented by counsel and was offered the opportunity to prepare a defense and introduce evidence, and all of the testimony adduced at the hearing was subject to cross-examination. From the above state of the record, we are of the opinion that the hearing was conducted as a fact-finding proceeding with a view toward achieving substantial justice.

As a final assertion of procedural unfairness, petitioner argues that it was denied its right to file a written brief to the Board as permitted by the Board's regulations. (Pollution Control Board Regulations, Section 330.) Petitioner does not contend that it was denied the opportunity to present argument, offer testimony or cross-examine witnesses as required by the Act,[15]

15. Ill. Rev. Stat. 1971, ch. 111½, par. 1032.

or that the Board issued its order without considering the statements, testimony and arguments submitted at the hearing as required by the Act.[16] The intent of the legislature, as seen from the Act itself, was to afford parties procedural due process. In the case at bar, the hearing conformed to fundamental principles of justice, and we construe the regulation providing that written briefs may be filed as a discretionary provision only. The Board did not abuse its discretion in rendering its order without considering briefs from the parties.

Petitioner's final contention is that the decision of the Board must be overturned because there is not substantial, competent evidence upon which to base that decision. Petitioner maintains that the decision was based on irrelevant allegations and prejudicial conclusions.

It is well established that a reviewing court may examine findings of an administrative agency to determine if they are supported by sufficient, competent evidence. (*St. James Temple of the A.O.H. Church of God, Inc.* v. *Board of Appeals*, 100 Ill. App.2d 302, 241 N.E.2d 525; *Russell* v. *License Appeal Commission*, 133 Ill.App.2d 594, 273 N.E.2d 650.

In the instant case, the complaint charged plaintiff with violations of the Act in discharging contaminants into the atmosphere on February 17, 1971, and causing or tending to cause air pollution. Complainants sought a cease and desist order and a $1,000 fine for the February 17th incident and every other day during which Fry discharged contaminants. The order of the Board ordered Fry to cease and desist and assessed a $50,000 penalty for violations of the particulate emissions provisions of the Rules and Regulations Governing the Control of Air Pollution; for failure to file a Letter of Intent and Air Contaminant Emission Reduction Program; and for causing air pollution.

Upon our review of the record, we are convinced that the Board's finding of air pollution by Fry, in violation of Section

16. Ill. Rev. Stat. *supra*, par. 1033(a).

9(a), is supported by substantial, competent evidence. Section 3(b) of the Act defines air pollution as the presence of sufficient quantity and quality of contaminants as to (1) be injurious to human life, (2) be injurious to plant life, (3) be injurious to animal life, (4) be injurious to health, (5) unreasonably interfere with the enjoyment of life or property. The Board's finding of a violation must rest upon a finding that the alleged pollution resulted in one or more of the above-mentioned situations.

The opinion of the Board erroneously states that it need only find "substantial interference" with the enjoyment of life or property in order to support a finding of violation of the statute. The Board found that the evidence:

> "amply supports a finding of severe nuisance and air pollution as defined in the statute * * * (and that Fry's operation caused) a severe burden and nuisance on the community."

These statements do not provide a necessary recognition of the elements of Sections 9(a), 3(b) and 3(d) which are required to support a finding of air pollution. Nowhere in the Board's opinion is there an explicit finding of "unreasonable" interference with the enjoyment of life or property of nearby residents. Our court has recently held that neither a finding of nuisance nor burden on the community amounts to a sufficiently specific finding that Fry "unreasonably" interfered with the enjoyment of life. See *Mystik Tape* v. *Illinois Pollution Control Board*, 16 Ill.App.3d 778, 306 N.E.2d 574.

However, we believe that sufficient, competent evidence was adduced at the hearing to support a finding of unreasonable interference with life and property. Affidavits of members of S.O.R.E. were introduced into evidence. These affidavits related specific instances of pollution by Fry on February 17, 1971 and on subsequent dates (in addition to irrelevant mention of instances prior to February 17, 1971). The affiants testified at the hearing that smoke and odors emanating from Fry interfered with the enjoyment of their property, and that they were able to identify the harmful and irritating odors as emanat-

ing from Fry. Fry was afforded opportunity, of which they availed themselves, to thoroughly cross-examine each of these witnesses.

One of the affiants, James Johnstone, testified that he lives four blocks from the Fry plant. He observed gray smoke and was aware of the odor of asphalt and felt emanating from the Fry smoke stacks. He testified that the smoke and odor "makes you sick * * * it makes your eyes water, parches your throat." He observed the smoke and was aware of the odor prior to February 17, 1971 and subsequently. He testified that the odor in the park across from the Fry plant is "bad," and that he could not jog in the park because of the odor and smoke.

Another affiant, Mary Younkers, who lives three blocks from Fry, testified that on April 16, 1971, she was in the park and was aware of odors emanating from Fry. The odors pervaded the area and caused her to leave the park. She also was aware of the odor in her home subsequent to February 17, 1971, and it caused her headaches and nausea.

Other witnesses testified that the odors being emitted from the Fry smoke-stacks were "obnoxious" or "disagreeable." More importantly, witnesses testified that the odor caused headaches, nausea, coughing and eye irritation. Therefore, we conclude that the evidence adduced supports a finding of unreasonable interference with the enjoyment of life and property of the residents. Section 33(c) of the Act provides:

> "In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions * * *."

We note that, in its order, the Board failed to demonstrate compliance with this section in that the order did not indicate consideration of the factors enumerated therein. Fry does not raise this issue on appeal, and moreover, we are of the opinion that sufficient evidence was adduced as to each enumerated factor to support the Board's findings.

Section 33(c)(i) concerns "the character and degree of injury to, or interference with the protection of health * * *."

The testimony of the affiants, as previously set forth in this opinion, is sufficient to indicate the character and degree of injury. Concerning "the social and economic value of the pollution source" (§ 33(c)(2)), Fry introduced evidence of the operation of the plant. As to the "suitability or unsuitability of the pollution source to the area in which it is located * * *" (§ 33(c)(3)), evidence was adduced as to the presence in the general area of the Chicago Metropolitan Sanitary District slush ponds, The Trumbull Asphalt Co. and the Corn Products Co. plant, in addition to residences and a public park. Finally, evidence concerning "the technical practicability and economic reasonableness of reducing or eliminating the emissions * * * resulting from such pollution source" (§ 33(c)(4)) was adduced through testimony regarding the availability of pollution devices to asphalt plants and the existence of pollution control devices on Fry plants in other areas of the country. In addition, the Fry plant manager testified that no emission control devices were employed, but that plans for installation of such devices had been made.

Based upon the evidence previously alluded to, the Board properly concluded that air pollution caused by Fry unreasonably interfered with enjoyment of life and property, and that Fry is in violation of Section 9(a) of the Act. Accordingly, we affirm that part of the order of the Pollution Control Board ordering Fry to comply with Section 9(a) of the Act; we reverse that part of the order finding Fry in violation of the Board's Rules and Regulations. Because the Board imposed a penalty of $50,000 for violations of the Act *and* the Regulations, and did not indicate what portion of the penalty was imposed for the statutory violation, we remand this cause to the Board for a redetermination of an appropriate penalty.

AFFIRMED IN PART;
REVERSED IN PART;
REMANDED IN PART.

HAYES, *P. J.*, and LEIGHTON, *J.*, concur.

46880

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

JUSTIN TAFT
CLERK

September 27, 1974

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No. 46880 - Lloyd A. Fry Roofing Company, a corp., petitioner, vs. Pollution Control Board (Environmental Protection Agency, et al., etc., respondents). Leave to appeal, Appellate Court, First District.

46880

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

JUSTIN TAFT
CLERK

September 27, 1974

TELEPHONE
AREA CODE 217
782-2035

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No. 46880 - Lloyd A. Fry Roofing Company, a corp., petitioner, vs. Pollution Control Board (Environmental Protection Agency, et al., etc., respondents). Leave

to appeal, Appellant

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court

APPENDIX C.

ILLINOIS ENVIRONMENTAL CONTROL ACT.

TITLE I: GENERAL PROVISIONS.

§ 1001. Short title and citation.] § 1. This Act shall be known and may be cited as the "Environmental Protection Act".

§ 1002. Legislative declaration.] § 2.(a). The General Assembly finds:

(i) that environmental damage seriously endangers the public health and welfare, as more specifically described in later sections of this Act;

(ii) that because environmental damage does not respect political boundaries, it is necessary to establish a unified statewide program for environmental protection and to cooperate fully with other States and with the United States in protecting the environment;

(iii) that air, water, and other resource pollution, public water supply, solid waste disposal, noise, and other environmental problems are closely interrelated and must be dealt with as a unified whole in order to safeguard the environment;

(iv) that it is the obligation of the State Government to manage its own activities so as to minimize environmental damage; to encourage and assist local governments to adopt and implement environmental-protection programs consistent with this Act; to promote the development of technology for environmental protection and conservation of natural resources; and in appropriate cases to afford financial assistance in preventing environmental damage; and

(v) that in order to alleviate the burden on enforcement agencies, to assure that all interests are given a full hearing, and to increase public participation in the task of protecting the environment, private as well as governmental remedies must be provided.

(b) It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.

§ 1003. Definitions.] § 3.(a). "Agency" is the Environmental Protection Agency established by this Act.

(b) "Air Pollution" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

(c) "Board" is the Pollution Control Board established by this Act.

(d) "Contaminant" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

(e) "Garbage" is waste resulting from the handling, processing, preparation, cooking, and consumption of food, and wastes from the handling, processing, storage, and sale of produce.

(f) "Institute" is the Illinois Institute for Environmental Quality established by this Act.

(g) "Open burning" is the combustion of any matter in the open or in an open dump.

(h) "Open dumping" means the consolidation of refuse from one or more sources at a central disposal site that does not fulfill the requirements of a sanitary landfill.

(i) "Person" is any individual, partnership, copartnership, firm, company corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal respresentative, agent or assigns.

(j) "Public water supply" means all mains, pipes and structures through which water is obtained and distributed to the public, including wells and well structures, intakes and cribs, pumping stations, treatment plants, reservoirs, storage tanks and appurtenances, collectively or severally, actually used or intended for use for the purpose of furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated communities where 10 or more separate lots or properties are being served or intended to be served; State-owned parks and memorials; and State-owned educational, charitable, or penal institutions.

(k) "Refuse" is any garbage or other discarded solid materials.

(l) "Sanitary landfill" means the disposal of refuse on land without creating nuisances or hazards to public health or safety, by confirming the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or at such more frequent intervals as may be necessary.

(m) "Sewage works" means individually or collectively those constructions or devices used for collecting, pumping, treating, and disposing of sewage, industrial waste or other wastes or for the recovery of by-products from such wastes.

(n) "Water pollution" is such alternation of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

(o) "Waters" means all accumulations of water surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

(p) "Municipality" means any city, village or incorporated town.

§ 1004. Environmental Protection Agency—Estiblishment —Director—Term and appointment—Duties and powers of agency. § 4.(a). There is established in the Executive Branch of the State Government an agency to be known as the Environmental Protection Agency. This agency shall be under the supervision and direction of a Director who shall be appointed by the Governor with the advice and consent of the Senate. The term of office of the Director shall expire on the third Monday of January in odd numbered years provided that he shall hold his office until his successor is appointed and qualified. The Director shall receive an annual salary of $35,000. The Director, in accord with the Personnel Code, shall employ and direct such personnel, and shall provide for such laboratory and other facilities, as may be necessary to carry out the purposes of this Act. In addition, the Director may by agreement secure such services as he may deem necessary from any other Department, agency, or unit of the State Government, and may employ and compensate such consultants and technical assistants as may be required.

(b) The Agency shall have the duty to collect and disseminate such information, acquire such technical data, and conduct such experiments as may be required to carry out the purposes of this Act, including ascertainment of the quantity and nature of discharges from any contaminant source and data on those sources, and to operate and arrange for the operation of devices for the monitoring of environmental quality.

(c) The Agency shall have authority to conduct a program of continuing surveillance and of regular or periodic inspection of actual or potential contaminant or noise sources, of public water supplies, and of refuse disposal sites.

(d) The Agency shall have authority to enter at all reasonsonable times upon any private or public property for the purpose of inspecting and investigating to ascertain possible violations of the Act or of regulations thereunder, in accordance with constitutional limitations.

(e) The Agency shall have the duty to investigate violations of this Act or of regulations adopted thereunder, to prepare and present enforcement cases before the Board and to take such summary enforcement action as is provided for by Section 34 of this Act.

(f) The Agency shall appear before the Board in any hearing upon a petition for variance, the denial of a permit, or the validity or effect of a rule or regulation of the Board, and shall have the authority to appear before the Board in any hearing under the Act.

(g) The Agency shall have the duty to administer, in accord with Title X of this Act, such permit and certification systems as may be established by this Act or by regulations adopted thereunder.

(h) The Agency shall have authority to require the submission of complete plans and specifications from any applicant for a permit required by this Act or by regulations thereunder, and to require the submission of such reports regarding actual or potential violations of the Act or of regulations thereunder, as may be necessary for purposes of this Act.

(i) The Agency may prescribe reasonable fees for permits required pursuant to this Act.

(j) The Agency shall have authority to make recommendations to the Board for the adoption of regulations under Title VII of the Act.

(k) The Agency shall have the duty to represent the State of Illinois in any and all matters pertaining to plans, procedures, or negotiations for interstate compacts or other governmental arrangements relating to environmental protection.

(l) The Agency shall have the authority to accept, receive, and administer on behalf of the State any grants, gifts, loans, or other funds made available to the State from any source for purposes of this Act or for air or water pollution control, public water supply, solid, waste disposal, noise abatement, or other environmental protection activities, surveys, or programs. Any federal funds received by the Agency pursuant to this subsection shall be deposited in a trust fund with the State Treasurer and held and disbursed by him in accordance with "An Act in relation to the receipt, custody, and disbursement of money allotted by the United States of America or any agency thereof for use in this State," approved July 3, 1939, as amended, provided that such monies shall be used only for the purposes for which they are contributed and any balance remaining shall be returned to the contributor.

The Agency is authorized to promulgate such regulations and enter into such contracts as it may deem necessary for carrying out the provisions of this subsection.

(m) The Agency is hereby designated as water pollution agency for the state for all purposes of the Federal Water Pollution Control Act, Public Law 80-845, approved June 30, 1948, as amended, as air pollution agency for the state for all purposes of the Federal Air Quality Act, Public Law 90-148, approved November 21, 1948, as amended; and as solid waste agency for the state for all purposes of the Federal Solid Waste Disposal Act, Public Law 89-272, approved October 20, 1965. The Agency is hereby authorized to take all action necessary or appropriate to secure to the State the benefits of such federal Acts, provided that the Agency shall transmit to the United States without change any standards adopted by the Pollution Control Board pursuant to Section 5(c) of this Act.

Any municipality, sanitary district, or other political subdivision, or any Agency of the State or interstate Agency, which makes application for loans or grants under such federal Acts shall notify the Agency of such application; the Agency may participate in proceedings under such federal Acts.

§ 1005. Pollution Control Board—Creation—Membership — Terms — Compensation — Chairman — Meetings — Quorum—Duties and powers.] § 5.(a). There is hereby created an independent board to be known as the Pollution Control Board, consisting of 5 technically qualified members, no more than 3 of whom may be of the same political party, to be appointed by the Governor with the advice and consent of the Senate. One of the members of the Board first appointed shall be appointed for an initial term expiring July 1, 1971; two members shall be appointed for initial terms expiring July 1, 1972; two members shall be appointed for initial terms expiring July 1, 1973. All successors shall hold office for three years from the first day of July in the year in which they were appointed except in case of an appointment to fill a vacancy. In case of a vacancy in the office when the Senate is not in session, the Governor may make a temporary appointment until the next meeting of the Senate when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in case of vacancies.

Members of the Board shall hold office until their respective successors have been appointed and qualified. Any member may resign from his office, such resignation to take effect when his successor has been appointed and has qualified.

Board members shall be paid $30,000 per year, and the Chairman $35,000 per year. Each member shall be reimbursed for expenses necessarily incurred, shall devote full time to the

performance of his duties and shall make a full financial disclosure upon appointment. Each Board member may employ one secretary and one assistant, and the Chairman one secretary and two assistants. The Board also may employ and compensate hearing officers to preside at hearings under this Act, and such other personnel as may be necessary. Hearing officers shall be attorneys licensed to practice law in Illinois.

The Governor shall designate one Board member to be Chairman, who shall serve at the pleasure of the Governor.

The Board shall hold at least one meeting each month and such additional meetings as may be prescribed by Board rules. In addition, special meetings may be called by the Chairman or by any two Board members, upon delivery of 24 hours written notice to the office of each member. All Board meetings shall be open to the public, and public notice of all meetings shall be given at least twenty-four hours in advance of each meeting. In emergency situations in which a majority of the Board certifies that exigencies of time require the requirements of public notice and of twenty-four hour written notice to members may be dispensed with, and Board members shall receive such notice as is reasonable under the circumstances.

Three members of the Board shall constitute a quorum, and three votes shall be required for any final determination by the Board, except in a proceeding to remove a seal under paragraph (d) of Section 34 of this Act. The Board shall keep a complete and accurate record of all its meetings.

(b) The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act.

(c) The Board shall have authority to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection. Such standards shall be adopted in accordance with Title

VII of the Act and upon adoption shall be forwarded to the Environmental Protection Agency for submission to the United States pursuant to Section 4(m) of this Act. Nothing in this paragraph shall limit the discretion of the Governor to delegate authority granted him under any federal law.

(d) The Board shall have authority to conduct hearings upon complaints charging violations of this Act or of regulations thereunder; upon petitions for variances; upon petitions for review of the Agency's denial of a permit in accordance with Title X of this Act; upon petition to remove a seal under Section 34 of this Act; and such other hearings as may be provided by rule.

(e) In connection with any hearing pursuant to subsections (b) or (d) of this section the Board may subpoena and compel the attendance of witnesses and the production of evidence reasonably necessary to resolution of the matter under consideration. The Board shall issue such subpoenas upon the request of any party to a proceeding under subsection (d) of this section or upon its own motion.

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TITLE II: AIR POLLUTION.

§ 1008. Legislative declaration.] § 8. The General Assembly finds that pollution of the air of this State constitutes a menace to public health and welfare, creates public nuisances, adds to cleaning costs, accelerates the deterioration of materials, adversely affects agriculture, business, industry, recreation, climate, and visibility, depresses property values, and offends the senses.

It is the purpose of this Title to restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution.

§ 1009. Acts prohibited.] § 9. No person shall:

(a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

(b) Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit;

(c) Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act; except that the Board may adopt regulations permitting open burning of refuse in certain cases upon a finding that no harm will result from such burning, or that any alternative method of disposing of such refuse would create a safety hazard so extreme as to justify the pollution that would result from such burning;

(d) Sell, offer, or use any fuel or other article in any areas in which the Board may by regulation forbid its sale, offer, or use for reasons of air-pollution control.

§ 1010. Regulations.] § 10. The Board, pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes of this Title. Without limiting the generality of this authority, such regulations may among other things prescribe:

(a) Ambient air quality standards specifying the maximum permissible short-term and long-term concentrations of various contaminants in the atmosphere;

(b) Emission standards specifying the maximum amounts or concentrations of various contaminants that may be discharged into the atmosphere;

(c) Standards for the issuance of permits for construction, installation, or operation of any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution;

(d) Standards and conditions regarding the sale, offer, or use of any fuel, vehicle, or other article determined by the Board to constitute an air-pollution hazard;

(e) Alert and abatement standards relative to air-pollution episodes or emergencies constituting an acute danger to health or to the environment;

(f) Requirements and procedures for the inspection of any equipment, facility, vehicle, vessel, or aircraft that may cause or contribute to air pollution;

(g) Requirements and standards for equipment and procedures for monitoring contaminant discharges at their sources, the collection of samples and the collection, reporting and retention of data resulting from such monitoring.

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TITLE VII: REGULATIONS.

§ 1026. Procedural rules—Adoption.] § 26. The Board may adopt such procedural rules as may be necessary to accomplish the purposes of this Act. Notice of the proposed adoption of procedural rules shall be given in accord with Section 28 of this Act, and any person may submit written statements regarding such proposals.

§ 1027. Adoption of substantive regulations—Charges.] § 27. The Board may adopt substantive regulations as described in Sections 10, 13, 17, 22 and 25 of this Act. Any such regulations may make different provisions as required by

circumstances for different contaminant sources and for different geographical areas; may apply to sources outside this State causing, contributing to, or threatening environmental damage in Illinois; and may make special provision for alert and abatement standards and procedures respecting occurrences or emergencies of pollution or on other short-term conditions constituting an acute danger to health or to the environment. In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act.

No charge shall be established or assessed by the Board or Agency against any person for emission of air contaminants from any source, for discharge of water contaminants from any source, for the sale, offer or use of any article, or for disposal of any refuse.

§ 1028. Proposals for adoption, amendment or repeal of regulations—Hearing—Notice.] § 28. Any person may present written proposals for the adoption, amendment, or repeal of the Board's regulations, and the Board may make such proposals on its own motion. If the Board finds that any such proposal is supported by an adequate statement of reasons, is accompanied by a petition signed by at least 200 persons, is not plainly devoid of merit and does not deal with a subject on which a hearing has been held within the preceding 6 months, the Board shall schedule a public hearing for consideration of the proposal. If such proposal is made by the Agency or by the Institute, the Board shall schedule a public hearing without regard to the above conditions. The Board may also in its

discretion schedule a public hearing upon any proposal without regard to the above conditions.

No substantive regulation shall be adopted, amended, or repealed until after a public hearing within the area of the State concerned. In the case of state-wide regulations hearings shall be held in at least two areas. At least 20 days prior to the scheduled date of the hearing the Board shall give notice of such hearing by public advertisement in a newspaper of general circulation in the area of the state concerned of the date, time, place and purpose of such hearings; give written notice to any person in the area concerned who has in writing requested notice of public hearings; and make available to any person upon request copies of the proposed regulations, together with summaries of the reasons supporting their adoption.

Any public hearing relating to the adoption, amendment, or repeal of Board regulations under this subsection shall be held before a qualified hearing officer, who shall be attended by at least one member of the Board, designated by the Chairman. All such hearings shall be open to the public, and reasonable opportunity to be heard with respect to the subject of the hearing shall be afforded to any person. All testimony taken before the Board shall be recorded stenographically. The transcript so recorded, and any written submissions to the Board in relation to such hearings, shall be open to public inspection, and copies thereof shall be made available to any person upon payment of the actual cost of reproducing the original.

After such hearing the Board may revise the proposed regulations before adoption in response to sugestions made at the hearing, without conducting a further hearing on the revisions.

Any person heard or represented at a hearing or requesting notice shall be given written notice of the action of the Board with respect to the subject thereof.

No rule or regulation, or amendment or repeal thereof, shall become effective until a certified copy thereof has been filed with

the Secretary of State, and thereafter as provided in "An Act concerning administrative rules," approved June 14, 1951, as amended.

§ 1029. Review.] § 29. Any person adversely affected or threatened by any rule or regulation of the Board may obtain a determination of the validity or application of such rule or regulation by petition for review under Section 41 of this Act.

Title VIII: Enforcement.

§ 1030. Investigations.] § 30. The Agency shall cause investigations to be made upon the request of the Board or upon receipt of information concerning an alleged violation of this Act or of any rule or regulation promulgated thereunder and may cause to be made such other investigations as it shall deem advisable.

§ 1031. Notice of violation—Service—Complaint by third persons—Burden of proof.] § 31.(a). If such investigation discloses that a violation may exist, the Agency shall issue and serve upon the person complained against a written notice, together with a formal complaint, which shall specify the provision of this law or the rule or regulation under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate this law or such rule or regulation and shall require the person so complained against to answer the charges of such formal complaint at a hearing before the Board at a time not less than 21 days after the date of notice, except as provided in Section 34 of this Act. A copy of such notice and complaint shall also be sent to any person who has complained to the Agency respecting the respondent within the six months preceding the date of the complaint, and to any person in the county in which the offending activity occurred who has requested notice of enforcement proceedings; 21 days notice of such hearings shall also be pub-

lished in a newspaper of general circulation in such county. The respondent may file a written answer, and at such hearing the rules prescribed in Sections 32 and 33 of this Act shall apply. In the case of actual or threatened acts outside Illinois contributing to environmental damage in Illinois, the extra-territorial service-of-process provisions of sections 16 and 17 of the Civil Practice Act shall apply.

(b) Any person may file with the Board a complaint, meeting the requirements of subsection (a) of this section, against any person allegedly violating this Act or any rule or regulation thereunder. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (a) of this section.

(c) In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board. If such proof has been made, the burden shall be on the respondent to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship.

§ 1032. Hearings.] § 32. All hearings under this Title shall be held before a qualified hearing officer, who may be attended by at least one member of the Board, designated by the Chairman. All such hearings shall be open to the public, and any person may submit written statements to the Board in connection with the subject thereof. In addition, the Board may permit any person to offer oral testimony.

Any party to a hearing under this subsection may be represented by counsel, may make oral or written argument, offer testimony, cross-examine witnesses, or take any combination of

such actions. All testimony taken before the Board shall be recorded stenographically. The transcript so recorded, and any additional matter accepted for the record, shall be open to public inspection, and copies thereof shall be made available to any person upon payment of the actual cost of reproducing the original.

§ 1033. Orders and determinations.] § 33.(a). After due consideration of the written and oral statements, the testimony and arguments that shall be submitted at the hearing, or upon default in appearance of the respondent on return day specified in the notice, the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances. In all such matters the Board shall file and publish a written opinion stating the facts and reasons leading to its decision. The Board shall immediately notify the respondent of such order in writing by registered mail.

(b) Such order may include a direction to cease and desist from violations of the Act or of the Board's rules and regulations and/or the imposition by the Board of money penalties in accord with Title XII of this Act. The Board may also revoke the permit as a penalty for violation. If such order includes a reasonable delay during which to correct a violation, the Board may require the posting of sufficient performance bond or other security to assume the correction of such violation within the time prescribed.

(c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

(ii) the social and economic value of the pollution source;

(iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

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TITLE XI: JUDICIAL REVIEW

§ 1041. Administrative Review Act applicable—Validity of orders.] § 41. Any party to a Board hearing, any person who filed a complaint on which a hearing was denied, any person who has been denied a variance or permit under this Act, and any party adversely affected by a final order or determination of the Board may obtain judicial review, by filing a petition for review within thirty-five days after entry of the order or other final action complained of, pursuant to the provisions of the "Administrative Review Act," approved May 8, 1945, as amended and the rules adopted pursuant thereto, except but review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court. Review of any rule or regulation promulgated by the Board shall not be limited by this section but may also be had as provided in Section 29 of this Act.

No challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of this Act as to any issue that could have been raised in a timely petition for review under this Section.

TITLE XII: PENALTIES

§ 1042. Violation of Act, regulation, determination or order —Liability for value of fish or aquatic life destroyed—Actions by State's Attorney or Attorney General.] § 42. Any person who violates any provision of this Act, or any regulation adopted

by the Board, or who violates any determination or order of the Board pursuant to this Act, shall be liable to a penalty of not to exceed $10,000 for said violation and an additional penalty of not to exceed $1,000 for each day during which violation continues, which may be recovered in a civil action, and such person may be enjoined from continuing such violation as hereinafter provided. Any person who violates this Act, or an order or other determination of the Board under this Act and causes the death of fish or aquatic life shall, in addition to the other penalties provided by this Act, be liable to pay to the State an additional sum for the reasonable value of the fish or aquatic life destroyed. Any money so recovered shall be placed in the Game and Fish Fund in the State Treasury.

The State's Attorney of the county in which the violation occurred, or the Attorney General shall bring such actions in the name of the people of the State of Illinois.

§ 1043. Injunctions.] § 43. In circumstances of extreme emergency creating conditions of immediate danger to the public health, the State's Attorney or Attorney General may institute a civil action for an immediate injunction to halt any discharge or other activity causing the danger. The court may issue an ex parte order and shall schedule a hearing on the matter not later than 3 working days from the date of injunction.

§ 1044. Violation of act or regulations—Misdemeanors—duty to enforce.] § 44. It shall be a misdemeanor to violate this Act or regulations thereunder, or knowingly to submit any false information under this Act or regulations adopted thereunder. It shall be the duty of all state and local law-enforcement officers to enforce such Act and regulations and all such officers shall have authority to issue citations for such violations.

§ 1045. Civil and criminal remedies not impaired by Act —Construction with Conservation of Oil and Gas etc. Act— Actions by persons adversely affected—Cost and attorney's fees.] § 45. (a) No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this Act. Nothing in this Act shall be construed to limit or supersede the provisions of "An Act in relation to oil, gas, coal and other surface and underground resources and to repeal an Act herein named", filed July 29, 1941, as amended, and the powers therein granted to prevent the intrusion of water into oil, gas or coal strata and to prevent the pollution of fresh water supplies by oil, gas or salt water or oil field wastes, except that water quality standards as set forth by the Pollution Control Board apply to and are effective within the areas covered by and affected by permits issued by the Department of Mines and Minerals. Providing that if the Department of Mines and Minerals fails to act upon any complaint within a period of ten working days following the receipt of said complaint by the Department, the Environmental Protection Agency may proceed under the provisions of this Act.

(b) Any person adversely affected in fact by a violation of this Act or of regulations adopted thereunder may sue for injunctive relief against such violation. However, no action shall be brought under this Section until 30 days after the plaintiff has been denied relief by the Board under paragraph (b) of Section 31 of this Act. The prevailing party shall be awarded costs and reasonable attorneys' fees.

§ 1049. Transitional provisions—Compliance with rules and regulations as prima facie defense.] § 49.(a) Until the Board and the Agency established by this Act has been appointed and taken office, the functions assigned to the Board and to the Agency shall be performed by the members of the existing Air Pollution Control Board and Sanitary Water Board and by the Department of Public Health.

(b) All proceedings respecting acts done before the effective date of this Act shall be determined in accordance with the law and regulations in force at the time such acts occurred. All proceedings instituted for actions taken after the effective date of this Act shall be governed by this Act.

(c) All rules and regulations of the Air Pollution Control Board, the Sanitary Water Board, or the Department of Public Health relating to subjects embraced within this Act shall remain in full force and effect until repealed, amended, or superseded by regulations under this Act.

(d) All orders entered, permits or certifications granted, and pending proceedings instituted by the Air Pollution Control Board, the Sanitary Water Board, or the Department of Public Health relating to subjects embraced within this Act remain in full force and effect until superseded by actions taken under this Act.

(e) Compliance with the rules and regulations promulgated by the Board under this Act shall constitute a prima facie defense to any action, legal, equitable, or criminal, or an administrative proceeding for a violation of this Act, brought by any person.

* * * * *

§ 1051. Severability of unconstitutional provisions.]

§ 51. If any section, subsection, sentence or clause of this Act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the Act as a whole or of any section, subsection, sentence or clause thereof not adjudged unconstitutional.

APPENDIX D.

ILLINOIS POLLUTION CONTROL BOARD

ENVIRONMENTAL PROTECTION AGENCY, *Complainant-Respondent,*	No. 71-4
REVEREND LOUIS HEMMERICH, et al., *Complainant-Respondent,*	No. 71-33
vs.	No. 72-85
LLOYD A. FRY ROOFING COMPANY, a Delaware corporation, *Respondent-Petitioner.*	

OPINION OF THE BOARD (by Mr. Lawton):

Petition for variance from the particulate regulations of the Rules and Regulations Governing the Control of Air Pollution was filed by Lloyd A. Fry Roofing Company (Fry), received by the Board on January 20, 1971. The petition describes the nature of the company's manufacturing process and the general nature of its emissions alleged to be at a rate of nine pounds per hour. The variance requests continuance of particulate emissions in excess of regulation limits for a period of "at least six months awaiting the determination of the route of the new southwest expressway, plus the twenty weeks time to fabricate and install the air pollution systems." The substance of the request is that petitioner fears the routing of the expressway might require acquisition of its property and that petitioner does not want to incur the cost of abatement equipment installation unless the continuity of its operation at its present location is assured. The

Board authorized hearing on this petition. On February 21, 1971, a citizen's complaint was filed with the Board by Louis Hemmerich and four other individuals all members of SORE (Save Our Resources and Environment), against Fry alleging:

> "that Respondent Fry did, on February 17, 1971, cause and allow the discharge and emission into the environment of contaminants so as to cause or tend to cause air pollution in Illinois, and further that Respondent Fry has engaged and continues to engage in a pattern of conduct such as to cause and allow the discharge and emission into the environment of contaminants so as to cause or tend to cause air pollution in Illinois."

Hearing was authorized on this complaint by which order of the Board was consolidated with Fry's variance petition for purposes of hearing.

At the initial hearing on the consolidated petition and complaint, Fry declined to introduce evidence in support of its variance petition but stated, through its counsel, "that the plans [for construction and installation of emission control equipment] will be off the drawing board and the company is going to proceed and that is what is in the record as far as Fry is concerned as far as the proceedings are concerned". (R. 18.) No details of this program, either as to the nature of the abatement equipment proposed to be installed or the time schedule for its installation appear on the record nor does any motion appear to have been made by Fry to withdraw its variance petition. On this state of the record, the Board has no alternative but to deny the variance as petitioner has failed to establish the statutory requisites for its allowance. Section 35, Environmental Protection Act.

IT IS THE ORDER of the Board that the petition for variance filed by Lloyd A. Fry Roofing Company be and the same is hereby denied.

The record of the proceeding, concluded on August 12, 1971 after six hearings, the transcript of which contains 906 pages, clearly establishes that Fry has caused air pollution as defined in

the Environmental Protection Act, Section 3(b) and has violated Section 9(a) of the Act, has emitted particulates into the atmosphere in an amount exceeding the limits set forth in the Rules and Regulations Governing the Control of Air Pollution, Section 3-3.111, which violations have continued since 1968 and are inherent in its daily operation, and has failed to file a letter of intent and an Air Contaminant Emission Reduction Program (Acerp) as required by the regulations, Sections 2-2.3 and 2-3.4.

Fry is ordered to cease and desist the emissions of particulates into the atmosphere in violation of the Environmental Protection Act and the Rules and Regulations Governing the Control of Air Pollution. Penalty is assessed against Fry in the amount of $50,000.00 for the violations aforesaid. Further hearing will be held in this matter as hereinafter provided.

Lloyd A. Fry Roofing Company is one of the world's largest manufacturers of asphalt roofing, operating 24 plants in various parts of the United States. The facility involved in the present proceeding is located in Summit, Illinois, where it has been engaged in production of asphalt roofing and allied products for many years. The Vollney Felt Mill appears to be a subsidiary or division of Fry and occupies the same premises, supplying the felt used in the operation. The Trumbell Asphalt Company, while purportedly being a separate entity in no way connected with Fry, is located contiguous to the Fry plant in Summit as it is in other parts of the country where Fry plants are located, and supplies the asphalt used in Fry's manufacturing process.

The recommendation of the Environmental Protection Agency filed in the variance proceeding, describes the manufacturing process. Since nothing has been introduced to refute these allegations, these statements will be accepted as true. Lloyd A. Fry, Jr. did testify to certain aspects of the operation which testimony appears consistent with the Agency's assertion. The manufacturing process may be briefly described as follows:

Woodchips are converted into fine wood flour which is combined with rags and cardboard scraps and placed in water-bearing tanks where a slurry is formed. The slurry, in turn, is processed through mashers after which the slurry is pumped into chests where specific thicknesses of the solid material are removed by a belt. This product constitutes the wet felt which is further processed through a battery of steam-heated drying rollers. After drying, the felt is processed through an asphalt saturator where the heated asphalt is absorbed by the felt. Coating is then applied and colored granules added. The finished product is then cooled, cut into shingles or wound in rolls. Approximately 4.7 tons of asphalt are consumed in the process. The Agency alleges that 165,000 gallons of No. 5 fuel oil of 1.5% sulphur content are consumed annually, and that 530 pounds of particulates and 106 pounds of SO^2 are emitted daily, resulting in emissions of 63.6 tons of particulates and 12.7 tons of SO^2 annually. The principal sources of emissions causing air pollution are the saturators. There is no control device of any sort located on the stacks connected with these units. No Air Contaminant Emission Reduction Program was ever submitted to the Air Pollution Control Board although Fry has been in constant operation at its present location since prior to 1967 when this requirement was enacted as a regulation of the Air Pollution Control Board.

On June 20, 1968, C. W. Klassen, Technical Secretary of the Illinois Air Pollution Control Board wrote (Environmental Protection Agency Exhibit No. 2) to Francis Nelson, Chief Engineer of Fry, as follows:

"Dear Mr. Nelson:

This is to confirm the conversation between you and our Engineer, Mr. William Zenisek, during his visit to your Plant on June 11, 1968.

The information which you furnished on the Asphalt Saturators has been reviewed with the following conclusions:

1. Process Weight Rate
   6250 lbs/hour (Saturant)

2. Allowable Emission Rate
   8.8 lbs/hour
3. Estimated Emission Rate
   65 lbs/hour

   "Compilation of Air Pollutant Emission Factors." (U. S. Public Health Service Publication No. 99-AP-42, page 33.)

Since the estimated emission rate exceeds the allowable emission rate, an Air Contaminant Emission Reduction Program must be filed for this source operation in compliance with the State Regulations, as soon as possible, as the due date for these programs was April 15, 1968.

We shall appreciate learning of your plans in this matter. If our Technical Staff can assist you, please feel free to contact us."

No Air Contaminant Emission Reduction Program was ever submitted by Fry to the Air Pollution Control Board or to this Board. Violation of this requirement is manifest. Likewise, particulate emissions in excess of those allowable based on the process weight are clearly demonstrated by the record. While the estimated emissions are 65 pounds per hour (R. 719, 753-60), it should be noted that the Environmental Protection Agency Exhibit No. 3, show emission rates ranging from 20 to 70 pounds per hour. However, even assuming the lowest figure, it is evident that Fry's emissions would be two and one-half times those permitted by the regulations. We have held (EPA v. Lindgren Foundry Co., #70-1) that standard emission factors may be used as a basis for determining violation in the absence of an affirmative showing that the specific pollution source involved or the circumstances relating to its operation are such as to make it substantially different from the elements considered in the standard emission factor computation. (See EPA v. Norfolk & Western Railway, #70-41.) The record in this case contains no evidence to call for a distinction, and, accordingly, we are justified in placing reliance on these figures. (See EPA Exhibit No. 1, Page 33.)

Even using the figures contained in the Air Pollution Engineering Manual, EPA Exhibit No. 3, showing a range of 20 to 70 pounds per hour (P. 378), a violation is clearly demonstrated. From the foregoing, it is evident that Fry has violated the regulations in its failure to file an Air Contaminant Emission Reduction Program and in failing to abate the emissions generated by its saturators, which are demonstrably in excess of the allowable emission limits of 8.8 pounds per hour. Fry operates today as it did in 1968 when these circumstances were originally brought to its attention. While the failure to file an Acerp and the continuation of unabated emissions in violation of the relevant regulations would be sufficient basis for imposing a substantial fine, it is also necessary to ascertain whether Fry's operation constitutes air pollution as defined in the statute.

In order to make such finding, it is necessary to go beyond the technical violation implicit in exceeding regulatory numbers and make a determination of whether Fry's operation substantially interfered with the enjoyment of life and property in the community. The record amply supports such finding. The record is replete with testimony by witnesses residing in the community who have suffered as a consequence of Fry's continuing indifference to their well-being.

Numerous witnesses testified to having observed heavy smoke emanating from Fry's stacks and at the same time, being acutely aware of the odors caused by these emissions. Witnesses testified to the unique nature of the asphalt odor and indicated their capability of distinguishing this particular smell from those caused by the sludge ponds of the Sanitary District, emissions from the Corn Products facility and odors characteristic of Diesel truck exhaust. The observations were frequent during the years 1970 and 1971, both up to and during the period of the trial. The emissions caused headache, nausea, burning of the eyes, nose and throat, coughing, upset stomach, and in many instances, foreclosed outdoor activities. Typical is the statement

of James S. Johnston, (R. 189). The smoke and odor "makes you sick . . . it makes your eyes water, parches your throat and you get sick from it." Observations were made by this witness during September and October, 1970 on four occasions, and four dates during 1971. Mary Younker testified to having observed emissions over a period of one-half year and stated that the odors filled her home and gave her headaches and nausea. She made observations on at least three occasions in 1970 and nine occasions in 1971.

Affidavits were introduced into evidence by the members of SORE, which further confirmed the severe burden Fry's operation has imposed on the neighborhood. In addition to the specific February 17, 1971 date set forth in the complaint, numerous other dates of observation and nuisance are observed. These affidavits were the subject of intensive cross-examination by Fry's counsel and all affiants were present at the hearing. We find no error in the admission of these affidavits, and feel that the testimony of these witnesses, both written and oral, amply support a finding of severe nuisance and air pollution as defined in the statute.

In addition to the personal distress created by Fry's operation, these witnesses testified to the inability to conduct Little League baseball and football in contiguous areas as a consequence of Fry's emissions. Typical of the affidavits is that of Katherine B. Massa:

> "She was, on Wednesday, February 17, 1971, at Walsh School, one block north of Fry Roofing on Archer Roard, and observed the following:
>
> The temperature was 20-30° and the sky was partly cloudy. The wind was from the southwest.
>
> Gray smoke was coming from the stacks on Fry Roofing Co. as pictured in Complainants' Exhibit No. 10.
>
> The odor of the smoke was exceptionally noxious, a heavy, tarry smell. The smoke and odor affected her and caused her eyes to tear and sting and caused her throat

to burn. She felt she would gag because of the sick feeling in her stomach.

She can recognize the smell of exhaust from diesel operated trucks, the odor emitted from Corn Products Corporation, and the odors from the sludge ponds and Sanitary District plant, all of which are different and distinct from the characteristic obnoxious odor of Fry Roofing.

She was again in the vicinity of Fry Roofing on Wednesday, February 24, 1971, at approximately 10:00 A. M., and 2:00 P. M. at which times she observed the following:

The wind was from the south.

Odor and smoke, of the same description as in paragraph 3.b. and 3.c. above were coming from the Fry plant.

On Wednesday March 24, 1971, at 10:00 A. M. and 2:00 P. M. and on March 25, 1971, at 10:00 A. M. and 2:00 P. M. she again saw smoke and smelled odor of the same description as that described in paragraphs 3.b and 3.c above.

On Friday, April 16, 1971, she was in the vicinity of Summit Park, which is immediately north of and adjoining the Fry Co. property, and observed the following:

Smoke was coming out of the stacks located on the Fry building, pictured in Complainants' Exhibit No. 10.

The smoke had the characteristic Fry odor.

When she walked into the park, she was enveloped in the smoke, as if by fog, which covered the entire basin of the park area.

She experienced the following physical effects: She was sickened, her stomach was turned, she had to cough, her eyes and throat burned, and she was forced to leave the park."

On the state of the record, it is abundantly clear that Fry's operation during the years 1970 and 1971 and continuing down to the present, have caused a severe burden and nuisance on the community. Our order will direct Fry to cease its operation until its pollutional discharges have been abated so as to comply with the regulations. If Fry had pursued the program

of emission control it represented it would follow at the first hearing in this case, it would now undoubtedly be in compliance with the regulations and the nuisance impact would be substantially lessened. The serious burden placed on the community by Fry's uncontrolled operation necessitates this course of action.

IT IS THE ORDER of the Pollution Control Board:

1. That Lloyd A. Fry Roofing Company cease and desist emissions from its Summit operation until such time as air pollution abatement equipment has been installed and is properly operating, which equipment shall bring Fry's emissions within the particulate regulations, as set forth in the Rules and Regulations Governing the Control of Air Pollution, Sections 2-2.11 and 3-3.111.
2. Fry shall advise this Board when such installation has been completed. This proceeding shall remain open and the Board shall conduct a further hearing not less than 30 nor more than 60 days after notice of the installation of said air pollution abatement equipment in order to ascertain whether odors being emitted by Fry's operation have been abated as a consequence of the air pollution control equipment installed. Such further orders shall be issued by this Board as are appropriate in consideration of the hearings.
3. Penalty in the amount of $50,000.00 is assessed against Fry for violations of the particulate emissions provisions of the Rules and Regulations Governing the Control of Air Pollution, for failure to file a Letter of Intent and Air Contaminant Emission Reduction Program as required by the Rules and Regulations Governing the Control of Air Pollution, Sections 2-2.3 and 2-2.4, and for causing air pollution as defined within the Environmental Protection Act, Section 9.a.

I, Regina E. Ryan, Clerk of the Board, certify that the Pollution Control Board adopted the above Opinion this 14 day of October, 1971.

/s/ REGINA E. RYAN.

APPENDIX E.

ILLINOIS POLLUTION CONTROL BOARD

ENVIRONMENTAL PROTECTION AGENCY, *Complainant-Respondent,*	
REVEREND LOUIS HEMMERICH, et al., *Complainant-Respondent,*	No. 71-4 No. 71-33 No. 72-85
vs.	
LLOYD A. FRY ROOFING COMPANY, a Delaware corporation, *Respondent-Petitioner.*	

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by Mr. Lawton):

On October 14, 1971, we entered an order in the above consolidated proceeding as follows:

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD:

1. That Lloyd A. Fry Roofing Company cease and desist emissions from its Summit operation until such time as air pollution abatement equipment has been installed and is properly operating, which equipment shall bring Fry's emissions within the particuate regulations, as set forth in the Rules and Regulations Governing the Control of Air Pollution, Sections 2-2.11 and 3-3.111.
2. Fry shall advise this Board when such installation has been completed. This proceeding shall remain open and the Board shall conduct a further hearing not less than 30 nor more than 60 days after notice of the installation of said air pollution abatement equipment in order to ascertain whether odors being emitted by Fry's operation have been abated as a consequence of the air

pollution control equipment installed. Such further orders shall be issued by this Board as are appropriate in consideration of the hearings.

3. Penalty in the amount of $50,000 is assessed against Fry for violations of the particulate emissions provisions of the Rules and Regulations Governing the Control of Air Pollution, for failure to file a Letter of Intent and Air Contaminant Emission Reduction Program as required by the Rules and Regulations Governing the Control of Air Pollution, Sections 2-2.3 and 2-2.4 and for causing air pollution as defined within the Environmental Protection Act, Section 9.a."

On November 12, 1971, we received from respondent, Lloyd A. Fry Roofing Company, a Petition for Rehearing and a separate Motion to Stay the Order and Decision of the Board of October 14, 1971. The Petition for Rehearing is denied. The Motion to Stay the Order of the Board is granted with respect to the assessment of the penalty subject to the conditions hereinafter provided, and is denied in all other respects.

The Petition for Rehearing is premised on the failure of the Board to enter an Order establishing a briefing schedule and permitting oral argument, and on its failure to enter a separate Order on complainant's Motion to Reopen the case. However, it is manifest that the October 14, 1971 Order of the Board is dispositive of all issues raised in Fry's Motion. The Board chose not to await the filing of briefs for the rendering of its decision, but took the case on the record. Furthermore, since no Brief was filed by complainant, there was no occasion for respondent to file an Answering Brief. Likewise, the Board chose to proceed without hearing oral argument.

Nor is respondent in any position to complain because of the Board's failure to reopen complainant's case. Indeed, respondent filed an Answer to the Motion to Reopen the complainant's case praying that the Motion be denied. In this respect respondent has prevailed and cannot now challenge the action of the Board in compliance with its prayer.

Respondent's Motion to Stay the October 14, 1971 Order of the Board was filed pursuant to Supreme Court Rule 335 which *governs procedure* where judicial review of our proceedings is sought. While we do not accept the legal argument of respondent in support of its Motion, we do stay our Order with regard to the assessment of penalty on condition that a bond to secure payment of the penalty in the event of an adverse judicial decision is filed with the Environmental Protection Agency within 15 days after receipt of this Order. As we said in *Spartan Printing Company* v. *EPA*, PCB 71-19, dated October 14, 1971:

> ". . . [W]e see no point in requiring the money to be paid now if it may have to be repaid after judicial review. The purposes of the order will be as well served by later payment if the appeal fails."

However, we decline to stay the other portions of our Order. If in fact respondent is proceeding with an Air Pollution Abatement Program and the installation of suitable equipment as alleged, and such equipment brings respondent's operation into compliance with the law, it has nothing to fear from either the Board or the Environmental Protection Agency by having complied with our Order. Further delay in this regard would only continue the obnoxious burden to the community caused by respondent which was the basis of the original Order of the Board.

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD:

1. The Petition of Lloyd A. Fry Roofing Company for Rehearing is denied.
2. The Motion of Lloyd A. Fry Roofing Company to Stay the Order and Decision of the Pollution Control Board of October 14, 1971, is granted as to the penalty provisions of the Order (¶ 3) on condition that a bond to secure payment of the penalty in the event of an adverse judicial decision is filed with the Environmental Protection Agency within 15 days after receipt of this Order, and is denied in all other respects.

I, Christian Moffett, Acting Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above Opinion and Order on this 15th day of November, 1971.

/s/ CHRISTIAN L. MOFFET,
Christian Moffett,
Acting Clerk.

APPENDIX F.

EXCERPT FROM BOARD HEARING.

R1038 Mr. Keenan: ". . . I believe the Board is about to go on vacation for a couple of weeks, and I would like to reserve the right to submit a brief within a reasonably short period of time, but longer than 10 days because of a heavy litigation load."

Hearing Officer Freeman: "Why don't you do it within a reasonable time after you receive a copy of the transcript."

R1039 Mr. Weitzenfeld: "How long after he submits his brief do I get to submit my replies?"

Hearing Officer Freeman: "What do you need?"

Mr. Weitzenfeld: "Whatever you set."

Mr. Keenan: "I will get it out in ten days after the transcript is available."

Hearing Officer Freeman: "Why don't you take ten days to answer."

APPENDIX G

EXCERPTS FROM ILLINOIS POLLUTION CONTROL BOARD PROCEDURAL RULES (1970)

308 *Motions and Answer.*

. . .

(f) The Hearing Officer shall rule upon all motions, except that he shall have no authority to dismiss or decide a proceeding on the merits, or for failure to state a claim, or for want of jurisdiction, or to strike any claim or defense for insufficiency or want of proof. The Hearing Officer shall refer any such motion to the Board. The Board may decide such motions at any time, but its inaction shall not stay proceedings nor preclude the Board from granting or denying the motion at a later time.

315 *Authority of Hearing Officer.* The Hearing Officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(1) administer oaths and affirmations;

(2) issue discovery orders;

(3) rule upon objections to subpoenas and discovery orders;

(4) rule upon offers of proof and receive evidence, subject to Rule 320;

(5) regulate the course of the hearings and the conduct of the parties and their counsel therein;

(6) hold pre-hearing converences [sic] for settlement, simplification of the issues, or any other proper purposes;

(7) consider and rule upon, as justice may require, motions appropriate to an adjudicative proceeding, subject to Rule 308;

(8) interrogate witnesses.

SUPREME COURT U.S.
FILED
FEB 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-786

LLOYD A. FRY ROOFING COMPANY, a corporation,
Petitioner,

vs.

ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, a body politic, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH et al.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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Printed by Authority of the State of Illinois

TABLE OF CITATIONS

CASES:

City of Monmouth v. *Pollution Control Board*, 57 Ill. 2d 482, 313 N.E. 2d 161 (1974) 4, 6, 8

Incinerator, Inc. v. *Pollution Control Board*, —— Ill. 2d ——, —— N.E. 2d —— (No. 46369, November 27, 1974) 4, 6

Broadrick v. *Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908 (1973) 5

Jaffe v. *Cruttenden*, 412 Ill. 606, 107 N.E. 2d 715 (1952) 5

Department of Mental Hygiene of California v. *Krichner*, 380 U.S. 194, 85 S. Ct. 871 (1965) 5

Asbury Hospital v. *Cass County*, 326 U.S. 207, 66 S. Ct. 61 (1945) 5

Cameron v. *Johnson*, 390 U.S. 611, 88 S. Ct. 1335 (1968) 5, 6

City of Waukegan v. *Pollution Control Board*, 57 Ill. 2d 170, 311 N.E. 2d 146 (1974) 7, 8

Helvering v. *Mitchell*, 303 U.S. 630, 58 S. Ct. 644 (1938) 7, 8

Gooding v. *Wilson*, 405 U.S. 518, 92 S. Ct. 1103 (1972) 9

Morgan v. *United States*, 298 U.S. 468, 56 S. Ct. 906 (1936) 9

Estate of Varian v. *Commissioner of Internal Revenue*, 396 F. 2d 753 (9th Cir. 1968), *cert. den.* 393 U.S. 962, 89 S. Ct. 402 9

Morgan v. *United States*, 304 U.S. 1, 58 S. Ct. 773 (1938) 9

ILLINOIS STATUTE:

Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½, §§ 1001, *et seq.* 4, 5, 6, 7, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-786

LLOYD A. FRY ROOFING COMPANY, a corporation,
Petitioner,

VS.

ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, a body politic, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH et al.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTES INVOLVED

Ill. Rev. Stat., ch. 111½, § 1033(c), in pertinent part:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> 1 the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> 2 the social and economic value of the pollution source;
>
> 3 the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
>
> 4 the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

ADDITIONAL STATEMENT OF THE CASE

The Complaint filed by the Illinois Environmental Protection Agency before the Illinois Pollution Control Board alleged, in part, that Fry Roofing Company violated the prohibition against air pollution contained in Section 9(a) of the Illinois Environmental Protection Act. In its Opinion and Order, the Board stated that it is necessary, when reviewing the record before it, to determine "whether Fry's operation *substantially* interfered with the enjoyment of life and property in the community". The Board then discussed the evidence contained in the record and found that Fry's operation "caused a severe burden and nuisance on the community".

The Illinois Appellate Court specifically addressed itself to the issue of whether the Board applied the proper statutory standard when reviewing the evidence in the record. The Appellate Court noted that one definition of air pollution, contained in Section 3(b) of the Act, refers to causing an *unreasonable interference with the enjoyment of life or property.* Following a discussion of applicable case law and of the evidence in the record, the Appellate Court construed the Opinion and Order of the Pollution Control Board as properly finding that Fry had caused an unreasonable interference with the enjoyment of life and property, and, therefore, that Fry violated the prohibition against air pollution contained in Section 9(a) of the Act.

ARGUMENT

I.

THE PROHIBITION AGAINST AIR POLLUTION, CONTAINED IN SECTION 9(a) OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT, IS DEFINITE AND CERTAIN SO AS TO ENABLE CITIZENS TO UNDERSTAND WHAT CONDUCT IS PROSCRIBED.

The Illinois Appellate Court affirmed that portion of the Illinois Pollution Control Board's decision finding that Fry caused air pollution in violation of Section 9(a) of the Act. Specifically, the Appellate Court interpreted the Board's decision as finding that Fry had caused an *unreasonable interference with the enjoyment of life and property,* and affirmed that decision. The above statutory definition of air pollution, as interpreted by Illinois courts, is well within this Court's requirements for a valid statute.

The Illinois Supreme Court has interpreted Section 9(a) of the Act as establishing a statutory prohibition against "air pollution", independent of the existence or violation of regulations or standards adopted by the Illinois Pollution Control Board, *City of Monmouth* v. *Pollution Control Board,* 57 Ill. 2d 482, 313 N.E. 2d 161 (1974). The Illinois Supreme Court has also interpreted the definition of air pollution contained in Section 3(b) of the Act as comprising two distinct categories of "air pollution". The first category is the presence in the atmosphere of contaminants injurious to human, plant or animal life, to health, or to property. The second category is the presence in the atmosphere of contaminants which unreasonably interfere with the enjoyment of life or property. *Incinerator, Inc.* v. *Pollution Control Board,* ——Ill. 2d——, ——N.E. 2d—— (No. 46369, November 27, 1974).

The Illinois Appellate Court and the Illinois Pollution Control Board found that Fry violated Section 9(a) of the Act by causing an unreasonable interference with the enjoyment of life and property. Fry was not found to have violated Section 9(a) of the Act by "threatening", or "allowing", or "tending to cause air pollution" or "causing air pollution in combination with contaminants from other sources". The constitutionality of these latter provisions was therefore not before the Illinois Appellate Court for decision. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610, 93 S. Ct. 2908, 2915 (1973); *Jaffe* v. *Cruttenden,* 412 Ill. 606, 613, 107 N.E. 2d 715, 720 (1952). Fry, therefore, may not claim the exercise of jurisdiction by this Court for the purpose of having the constitutionality of provisions reviewed which were not involved in the Illinois court proceedings. *Department of Mental Hygiene of California* v. *Kirchner,* 380 U.S. 194, 197, 85 S. Ct. 871, 873 (1965). Additionally, no Illinois court has yet addressed itself to the construction or constitutionality of those provisions. This Court has refused to review state statutes under such circumstances. *Asbury Hospital* v. *Cass County,* 326 U.S. 207, 215, 66 S. Ct. 61, 65 (1945).

Fry's primary objection to the air pollution prohibition is, therefore, that it prohibits the emission of contaminants which *unreasonably interfere* with the enjoyment of life or property. Fry erroneously argues that no person of common intelligence could possibly guide his conduct so as to comply with this standard. A decision by this Court reviewing similar statutory language has held that such a statute clearly and precisely delineates the required conduct in words of common understanding. In *Cameron* v. *Johnson,* 390 U.S. 611, 88 S. Ct. 1335 (1968), petitioner sought a judgment declaring the Mississippi Anti-Picketing Statute unconstitutional on vagueness grounds. That statute provided in pertinent part:

> It shall be unlawful for any person . . . to engage in picketing or mass demonstrations in such a manner as to obstruct or *unreasonably interfere* with free ingress or egress to and from any public premises. . . . [emphasis added]

Against the same challenge that Fry makes here, this Court upheld the statutory provision, stating, at 390 U.S. 616, that

> . . . the statute prohibits only "picketing" . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . . .The terms "obstruct" and unreasonably interfere" plainly require no "guess(ing) at (their) meaning. Appellants focus on the word "unreasonably". [footnote omitted] It is a widely used and well understood word and clearly so when juxtaposed with "obstruct" and "interfere". We conclude that the statute clearly and precisely delineates its reach in words of common understanding. [footnote omitted]

The statute in *Cameron* involved no guidelines or standards other than those provided by the common understanding of the phrase "*unreasonably interfere*" when taken in its statutory context. While these guidelines, by themselves, are sufficiently precise, the Illinois Supreme Court has interpreted the Illinois Environmental Protection Act as containing additional statutory guidelines and standards. The Illinois Supreme Court held that the unreasonableness of the interference with the enjoyment of life or property is to be determined with reference to those specific factors enumerated in Section 33(c) of the Act. *Incinerator, Inc.* v. *Pollution Control Board,* —Ill. 2d—, ——N.E. 2d —— (No. 46369, November 27, 1974); *City of Monmouth* v. *Pollution Control Board,* 57 Ill. 2d 482, 313

N.E. 2d 161 (1974); *City of Waukegan* v. *Pollution Control* Board, 57 Ill. 2d 170, 311 N.E. 2d 146 (1974). Such a statutory construction eliminates any question of constitutional infirmity.

II.

PROCEEDINGS BEFORE THE ILLINOIS POLLUTION CONTROL BOARD ARE CIVIL IN NATURE.

Section 42 of the Illinois Environmental Protection Act specifies sanctions which the Illinois Pollution Control Board may impose for violations of the Act. Fry contends that the sanctions authorized by Section 42 are criminal in nature. Because the State of Illinois may bring criminal actions for violations of the Act in Illinois trial courts, Fry contends that the State is permitted by the Act to arbitrarily choose to initiate criminal proceedings either before the Pollution Control Board or in the State courts. Therefore, Fry argues, a respondent before the Illinois Pollution Control Board is unconstitutionally denied the procedural guarantees to which a defendant in a criminal action is entitled. Decisions by the Illinois Supreme Court interpreting the Illinois Environmental Protection Act invalidate such assumptions and foreclose Fry's contention that the Act is unconstitutional.

Both civil and criminal sanctions may be imposed in respect to the same act or omission. It is only when the sanction sought to be imposed is criminal in nature that the constitutionally required procedures governing criminal prosecutions must be afforded parties to the proceeding. *Helvering* v. *Mitchell*, 303 U.S. 630, 58 S. Ct. 644 (1938). Whether a particular statutory sanction is civil or criminal in nature is a question of statutory construction.

Helvering v. *Mitchell*, 303 U.S. 630, 58 S. Ct. 644 (1938). In cases challenging the constitutionality of the Environmental Protection Act, the Illinois Supreme Court has been required to construe the nature of the sanctions authorized by Section 42 of the Act and has held that such sanctions are civil. *City of Monmouth* v. *Pollution Control Board*, 57 Ill. 2d 482, 313 N.E. 2d 161 (1974); *City of Waukegan* v. *Pollution Control Board*, 57 Ill. 2d 170, 311 N.E. 2d 146 (1974). Fry's constitutional challenge, based upon the contention that proceedings before the Pollution Control Board are criminal in nature, is therefore without merit.

III.

THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE POLLUTION CONTROL BOARD'S REGULATIONS CONCERNING THE SUBMISSION OF WRITTEN OR ORAL ARGUMENTS ARE IN ACCORD WITH THIS COURT'S STANDARDS FOR A FAIR HEARING.

Fry lastly argues that, by permitting the Pollution Control Board to enter its Decision and Order prior to the submission of written briefs by the parties, the Environmental Protection Act and the Pollution Control Board's regulations violate due process. The Illinois Appellate Court interpreted the Environmental Protection Act as not requiring the Pollution Control Board to await the filing of written briefs by the parties prior to its rendering a decision. The Appellate Court also held that, based upon the facts before it, the Board did not abuse its discretion by rendering its decision without considering briefs from the parties. Fry asks this Court to review the con-

stitutionality of the Environmental Protection Act *as interpreted by the Illinois Appellate Court. Gooding* v. *Wilson,* 405 U.S. 518, 92 S. Ct. 1103 (1972).

The Act requires that the Pollution Control Board, when making its orders and decisions, consider the written and oral statements submitted at the hearing [Sections 33(a) and 32] and the testimony and arguments submitted at the hearing [Section 33(a)]. Fry has not contended that the Board in any way violated these requirements. In *Morgan* v. *United States,* 298 U.S. 468, 56 S. Ct. 906 (1936), this Court specified the requirements for a full and fair hearing. In discussing the issuance of an order by a tribunal or person who had not considered the evidence or the argument of the parties, this Court stated, at 56 S. Ct. 912, that:

> . . . there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, *the officer who makes the determinations must consider and appraise the evidence which justifies them.* [emphasis supplied]

Morgan has been interpreted to require "that the officer who makes the findings must have considered evidence or argument". *Estate of Varian* v. *Commissioner of Internal Revenue,* 396 F. 2d 753, 755 (9th Cir. 1968), *cert. den.* 393 U.S. 962, 89 S. Ct. 402. The so-called "second" *Morgan* case [*Morgan* v. *United States,* 304 U.S. 1, 58 S. Ct. 773 (1938)] simply does not contain the holdings enumerated by Fry in its argument. (Pet. brief, pp. 15-16).

The requirement placed upon the Pollution Control Board by the Illinois General Assembly to consider and appraise the evidence when making its determinations is fully in accord with this Court's prior case law.

CONCLUSION

Respondents respectfully pray that Fry Roofing Company's Petition For Writ of Certiorari be denied.

Respectfully submitted,

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MAR 4 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-786

LLOYD A. FRY ROOFING COMPANY,
A CORPORATION,
Petitioner,

vs.

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REPLY BRIEF IN OPPOSITION TO BRIEF OF ATTORNEY GENERAL OF ILLINOIS AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CITATIONS.

CASES.	PAGE
Cameron v. Johnson, 390 U. S. 611 (1968)	4
Cline v. Frink Dairy Company, 274 U. S. 445 (1927)	4
Davern v. Civil Service Commission, 47 Ill. 2d 469 (1970)	3
Morgan v. United States, 304 U. S. 1 (1938)	7
Mystik Tape v. Pollution Control Board, 16 Ill. App. 3d 778 (1973)	3
NLRB v. Babcock and Wilcox Co., 351 U. S. 105 (1955)	3
Pacesetter Homes v. Village of South Holland, 18 Ill. 2d 247 (1959)	3

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ARGUMENT.

I.

THE DECISION BELOW CONFLICTS WITH AND INDEED FLAUNTS THE HOLDINGS OF THIS COURT IN CASES SUCH AS UNITED STATES v. L. COHEN GROCERY, 255 U. S. 81 (1920), CONNALLY v. GENERAL CONSTRUCTION COMPANY, 269 U. S. 385 (1926), CLINE v. FRINK DAIRY COMPANY, 274 U. S. 445 (1927), GIACCIO v. PENNSYLVANIA, 382 U. S. 399 (1966) AND PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 U. S. 156 (1972) THAT STATUTES AS VAGUE, INDEFINITE AND UNCERTAIN AS THE ILLINOIS ENVIRONMENTAL CONTROL ACT VIOLATE DUE PROCESS. IF THE DECISION BELOW IS PERMITTED TO STAND, THERE WILL BE NO GUIDELINES WHATSOEVER UPON WHICH PERSONS MAY BASE THEIR CONDUCT SO AS TO PREVENT A CONVICTION FOR "AIR POLLUTION" UNDER THE ILLINOIS ACT AND SIMILAR STATUTES.

The touchstone of Illinois Attorney General's argument is founded upon Section 33(c) of the Act*, a provision which purports to list certain factors for the Pollution Control Board to "consider" in determining the "reasonableness" of emissions. But Petitioner submits that the lack of merit in this argument is readily apparent.

In the first place, the so-called "limitations" or "definitions" contained in Section 33(c) are every bit as meaningless and obscure as the more general prohibition against "unreasonable interference." Clearly, they do not cure the unconstitutional vagueness inherent in this Act.

Moreover, the State has neglected to advise this Court that the Illinois Pollution Control Board did not even consider Section 33(c) in deciding this case. As the Appellate Court stated:

* Ill. Rev. Stats., ch. 111½, § 1033(c).

> "We note that, in its order, the Board failed to demonstrate compliance with this section [§ 33(c)] in that the order did not indicate consideration of the factors enumerated therein." (Appendix A to Petition, P. A15.)

While the Appellate Court apparently viewed the record as containing some evidence which the Board might have considered in conjunction with Section 33(c) had the Board complied with the Act, it is well settled that a reviewing court may not substitute its judgment for that of an administrator and cannot permit an administrative decision to stand if it rests upon erroneous legal foundations (*NLRB* v. *Babcock and Wilcox, Co.*, 351 U. S. 105 (1955); *Davern* v. *Civil Service Commission*, 47 Ill. 2d 469 (1970); *Mystik Tape* v. *Pollution Control Board*, 16 Ill. App. 3d 778 (1973)). Clearly, Section 33(c) has no bearing upon the propositions advanced in the Petition for Certiorari.

The State further contends that Petitioner may not mention to this Court that the Illinois Statute contains language, in addition to "unreasonably interfer[ing] with the enjoyment of life or property", which is also unconstitutionally vague. But this contention too is without merit, particularly so since the State does not claim that the additional language is proper.

Obviously, the main thrust of Petitioner's argument is directed to the "unreasonable interference" provision. Yet in view of the conflicting nature of the holdings below, Petitioner respectfully submits that it is wholly justified in pointing out the invalidity of the entire Statute to this Court. It cannot be said with any degree of certainty that these other prohibitions were not involved in the decisions below. And, as the Illinois Supreme Court has held:

> "The validity of a penal ordinance such as the one in question here cannot be made to depend upon facts found in the particular case . . . It is either valid as to all that it embraces or it is invalid as to all that it embraces." (*Pacesetter Homes* v. *Village of South Holland*, 18 Ill. 2d 247, at pp. 250-251 (1959)).

Finally, the State's reliance upon the majority opinion in *Cameron* v. *Johnson*, 390 U. S. 611 (1968) is totally misplaced. In the first place, the statute involved in *Cameron* was directed to the physical acts of picketing and demonstrating. It did not purport to prohibit "contamination", a word so broadly defined in the Illinois Act as to literally forbid breathing. Moreover, as this Court specifically noted in *Cameron*, the words "unreasonably interfere" were used there in direct juxtaposition with "obstruct" and "free ingress or egress to and from any public premises." The *Cameron* statute obviously contained guidelines sufficient to enable persons "of common intelligence" to determine "what conduct on their part will render them liable to its penalties" (*Cline* v. *Frink Dairy Company*, 274 U. S. 445 (1927), at p. 459). No guidelines, except the unfettered whim of a State court or administrative board, appear in the Illinois Act and *Cameron* is completely inapplicable here.

II.

UNDER THE ILLINOIS ENVIRONMENTAL PROTECTION ACT, A CHARGE OF VIOLATION MAY BE BROUGHT IN CRIMINAL COURT OR IN A SO-CALLED "ADMINISTRATIVE" PROCEEDING. BUT AN ADMINISTRATIVE DEFENDANT IS SUBJECT TO A GREATER MONETARY PENALTY THAN A CRIMINAL DEFENDANT CHARGED WITH THE SAME OFFENSE. YET AN ADMINISTRATIVE DEFENDANT IS DENIED THE RIGHT TO A TRIAL BY JURY, DENIED THE RIGHT TO A TRIAL UNDER THE RULES OF EVIDENCE AND DENIED THE RIGHT TO PROOF OF GUILT BEYOND A REASONABLE DOUBT. SINCE THE STATE MAY ARBITRARILY PICK AND CHOOSE BETWEEN THESE TWO MEANS OF ENFORCEMENT, THE ACT VIOLATES EQUAL PROTECTION AND DUE PROCESS.

Petitioner submits that the State's position with respect to this section of the Petition for Certiorari is simply a blatant appeal for the elevation of form over substance. While the Illinois

Supreme Court has said that proceedings before the Pollution Control Board are "civil" in nature, those decisions were rendered in response to arguments that the Board had invaded the *judicial* power by computing and imposing fines.

The point of Petitioner's contention here, completely ignored by the State, is that it does not matter whether a Board proceeding be called "civil", "quasi-criminal", "administrative", or by any other name. The label is irrelevant. What is significant is that the *substance and effect* of such a proceeding so closely resemble the criminal proceeding provided as an alternative means of enforcement under the Act that the State simply cannot be permitted to choose the "administrative" proceeding unless an administrative defendant receives the same guarantees as a criminal defendant. But an "administrative" defendant under the Illinois Act is clearly denied those rights. If that Act is permitted to stand, any charge at all may now be heard by a nonjudicial "administrative" tribunal and trials before such bodies may proceed without any of the well-settled rules long held necessary to protect the rights of a defendant. Indeed, that is precisely what occurred in this case.

Petitioner respectfully submits that the State's attempt to suggest that labels are more important than substance should not be permitted to obscure the clear constitutional defects contained in the Illinois Environmental Protection Act.

III.

THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE POLLUTION CONTROL BOARD'S PROCEDURAL RULES GUARANTEE THAT A DEFENDANT HAS THE RIGHT TO SUBMIT WRITTEN AND ORAL ARGUMENT. BUT THE BOARD HERE REFUSED TO PERMIT FRY TO SUBMIT WRITTEN OR ORAL ARGUMENT AND THE APPELLATE COURT'S DECISION UPHOLDING THE BOARD IS IN CLEAR CONFLICT WITH THE STATUTE, THE BOARD RULES, THE CONSTITUTION AND THE LAW OF THIS COURT.

Review of the State's brief clearly reveals that it has not and indeed cannot rebut the propositions that Fry was wrongfully denied its due process right to submit argument and that this denial was in obvious violation of the Statute, the Board's own Rules and the law of this Court. However, brief comment does appear required as to some of the State's patently improper assertions.

Thus, the State posits that "Fry has not contended" the Board violated the Act when it decided the case before Fry had the opportunity to submit a brief or to make oral argument. But surely such an incredible assertion could only be meant to mislead this Court. Fry has clearly made such a contention, not only in its Petition for Certiorari, but also before the Board, the Illinois Appellate Court and the Illinois Supreme Court. What Fry has argued is that the Statute and Board Rules grant a defendant the absolute right to submit a written brief *after* the close of the hearing and further require that the Board consider both the brief and oral argument before it decides the case. The Board below flagrantly and wilfully defied the Statute and its own Rules. Such conduct may not be excused by the bald misstatement that Fry made no such contention or by the equally improper device of arguing that the Statute and Board Rules should be construed in a manner completely contrary to their

clear language. The Statute provides that "any party to a [Board] hearing . . . may make oral or written argument" (Section 1032). The Board Rules state that: "The parties may submit written briefs to the Board . . . *after the close of the hearing* . . .". (Rule 330, emphasis supplied). Those rights were denied to Fry.

And even if the Statute and Rules were not so clear, the law of this Court, as reflected in the "second *Morgan*" case (*Morgan* v. *United States*, 304 U. S. 1 (1938)), unquestionably provides the same guaranteed right to submit argument to the decision maker before one is convicted of statutory violation and fined a most substantial sum. It is the State, Petitioner submits, which has misread that case. As Fry pointed out in its Petition for Certiorari, any "argument" which might be made during the course of a trial or hearing is neither sufficient to meet the clear language of the Statute and Rules nor due process as defined by this Court. Indeed, it is completely irrelevant to the point at hand, despite the State's efforts to create confusion in that regard. The Board and the Illinois Courts have clearly ignored the Statute and Rules and have denied Fry due process. The decision below should be aside.

CONCLUSION.

Petitioner respectfully prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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MAR 6 1975

MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1974

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REPLY BRIEF IN OPPOSITION TO BRIEF OF RESPONDENTS HEMMERICH, ET AL. AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

PAGE

Boyce Motor Lines v. *United States*, 342 U. S. 337 (1952). 3

Cline v. *Frink Dairy Company*, 247 U. S. 445 3

Houston Compressed Steel Corp. v. *Texas*, 455 S. W. 2d 768 (1970) 4

Metropolitan Sanitary District v. *U. S. Steel*, 41 Ill. 2d 440 (1968) 4

Morgan v. *United States*, 304 U. S. 1 (1938) 7

Mystik Tape v. *Pollution Control Board*, 16 Ill. App. 3d 778 (1973) 4

Oriental Boulevard Co. v. *Heller*, 27 N. Y. 2d 212, 316 N. Y. S. 2d 226, 265 N. E. 2d 72 (Appeal Dismissed, 401 U. S. 986 (1971)..... 3

United States v. *L. Cohen Grocery*, 255 U. S. 81 (1920) 3

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I.

THE DECISION BELOW CONFLICTS WITH AND INDEED FLAUNTS THE HOLDINGS OF THIS COURT IN CASES SUCH AS UNITED STATES v. L. COHEN GROCERY, 255 U. S. 81 (1920), CONNALLY v. GENERAL CONSTRUCTION COMPANY, 269 U. S. 385 (1926), CLINE v. FRINK DAIRY COMPANY, 274 U. S. 445 (1927), GIACCIO v. PENNSYLVANIA, 382 U. S. 399 (1966) AND PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 U. S. 156 (1972) THAT STATUTES AS VAGUE, INDEFINITE AND UNCERTAIN AS THE ILLINOIS ENVIRONMENTAL CONTROL ACT VIOLATE DUE PROCESS. IF THE DECISION BELOW IS PERMITTED TO STAND, THERE WILL BE NO GUIDELINES WHATSOEVER UPON WHICH PERSONS MAY BASE THEIR CONDUCT SO AS TO PREVENT A CONVICTION FOR "AIR POLLUTION" UNDER THE ILLINOIS ACT AND SIMILAR STATUTES.

At the outset, Petitioner must respectfully submit that the attitude which pervades the Individual Respondents' Brief has no place before this Court. Certainly, name-calling, the protestation of good intentions and the involvement of Fry in different litigation do not meet the substance of the Petition for Certiorari. Petitioner contends, and earnestly so, that the Constitution and law of the land are the paramount factors in any question of statutory validity and that the passions of a cause, no matter how worthy, cannot outweigh that overriding precept.

Indeed, the very fact that the Individual Respondents have approached this case on the basis of emotionalism highlights the fact that the Illinois Act is unconstitutionally vague; its lack of standards necessarily leads to such an approach. Surely, a statute which provides for conviction and a $50,000 fine on the

sole basis of a finding of "unreasonabl[e] interfere[nce] with the enjoyment of life or property" not only permits but indeed encourages the type of persecutions and inquiries prohibited by this Court in *United States* v. *L. Cohen Grocery*, 255 U. S. 81 (1920). The Act is clearly insufficient to permit "men of common intelligence" to do anything more than "guess at its meaning and differ as to its application" (*Cline* v. *Frink Dairy Company*, 247 U. S. 445, at p. 459 (1927)).

While the Individual Respondents state that the Act has "sufficient standards," they point to none. The reason, Petitioner submits, is obvious. This Act is virtually indistinguishable in its absence of standards from those statutes held unconstitutional in *L. Cohen Grocery* and *Cline* v. *Frink Dairy Company*.

The cases discussed by the Individual Respondents are totally without application here. Thus, their assertion that *Oriental Boulevard Co.* v. *Heller*, 27 N. Y. 2d 212, 316 N. Y. S. 2d 226, 265 N. E. 2d 72 (appeal dismissed, 401 U. S. 986 (1971)) is "remarkably similar" to this case is bald misstatement. In *Oriental*, a municipal ordinance was attacked on the grounds that it was beyond the city's authority (the State having allegedly pre-empted the field), that it would be difficult for plaintiffs to comply therewith, and that the ordinance could be read as providing for the summary sealing of some offending equipment without notice and hearing. *No claim at all was made that the ordinance was vague, indefinite or uncertain.*

Boyce Motor Lines v. *United States*, 342 U. S. 337 (1952) involved an I. C. C. regulation far more detailed and specific than the Act at bar. Indeed, that long standing regulation, drafted with the extensive participation of the trucking industry, required proof of a *willful* violation. It also clearly prohibited the transportation of inflammable liquids through tunnels, the *very* offense with which defendant there was charged (342 U. S. at pp. 339, 341-2).

Metropolitan Sanitary District v. *U. S. Steel,* 41 Ill. 2d 440 (1968) was cited by the Illinois Appellate Court in its opinion. But that case stands only for the proposition that a word which is *undefined* in a statute (there "pollution") may be interpreted by reference to the common law. On the other hand, the Act at bar contains its own "definition" of pollution and the Illinois courts have specifically held that a charge of "unreasonable interference with the enjoyment of life and property" thereunder *cannot* be analogized to a common law cause of action (Appendix A to Petition for Certiorari, p. A14; *Mystik Tape* v. *Pollution Control Board,* 16 Ill. App. 3d 778, at p. 799 (1973)). Indeed, it is the Act's very "definition" which is unconstitutionally vague. Obviously, *Metropolitan* has nothing to do with this case.

In *Houston Compressed Steel Corp.* v. *Texas,* 455 S. W. 2d 768 (1970), defendant's conduct (outdoor burning) was specifically prohibited by regulation and the defendant made *no* claim that the statute or regulations were unconstitutionally vague.

Clearly then, the contentions of the Individual Respondents are without merit and the cases they cite without application. Petitioner respectfully requests that its Petition be allowed.

II.

UNDER THE ILLINOIS ENVIRONMENTAL PROTECTION ACT, A CHARGE OF VIOLATION MAY BE BROUGHT IN CRIMINAL COURT OR IN A SO-CALLED "ADMINISTRATIVE" PROCEEDING. BUT AN ADMINISTRATIVE DEFENDANT IS SUBJECT TO A GREATER MONETARY PENALTY THAN A CRIMINAL DEFENDANT CHARGED WITH THE SAME OFFENSE. YET AN ADMINISTRATIVE DEFENDANT IS DENIED THE RIGHT TO A TRIAL BY JURY, DENIED THE RIGHT TO A TRIAL UNDER THE RULES OF EVIDENCE AND DENIED THE RIGHT TO PROOF OF GUILTY BEYOND A REASONABLE DOUBT. SINCE THE STATE MAY ARBITRARILY PICK AND CHOOSE BETWEEN THESE TWO MEANS OF ENFORCEMENT, THE ACT VIOLATES EQUAL PROTECTION AND DUE PROCESS.

Much like the Illinois Attorney General, the individual Respondents have elected to respond to this section of the Petition with a request that form be elevated over substance. But Petitioner submits that it does not matter whether a Board proceeding has been initiated by the State or by an individual. The Board here decided an obvious adversary proceeding. It convicted Fry of statutory violation and imposed a $50,000 fine. The nature of that proceeding was such that the right to a fair trial, guaranteed to a criminal defendant under the Act, cannot be denied to an "administrative" defendant, as it was below. The identity of the complainant is beside the point.

Nor are these Respondents correct in their assertion that Board proceedings are the only available method which individuals might pursue. Obviously, private citizens can initiate criminal complaints and file civil lawsuits. But so long as criminal proceedings are an available alternative under the Act, Board proceedings must also conform to due process; if not, substantial rights have been denied.

Finally, Petitioner must point out that the State of Illinois was a very real and significant party to the proceedings

below. Fry's petition for a variance formed virtually no part of the proceedings from the very outset. Nonetheless, the State thereafter actively participated in the hearings, clearly assisting the Individual Respondents. It supplied witnesses, including so-called "experts", to testify against Fry. Its attorneys were every bit as active as those representing the Individual Respondents. Even if there were any significance to the fact that the Complaint for statutory violation was not filed by the State it would not affect the proposition that Fry was denied its guaranteed rights.

III.

THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE POLLUTION CONTROL BOARD'S PROCEDURAL RULES GUARANTEE THAT A DEFENDANT HAS THE RIGHT TO SUBMIT WRITTEN AND ORAL ARGUMENT. BUT THE BOARD HERE REFUSED TO PERMIT FRY TO SUBMIT WRITTEN OR ORAL ARGUMENT AND THE APPELLATE COURT'S DECISION UPHOLDING THE BOARD IS IN CLEAR CONFLICT WITH THE STATUTE, THE BOARD RULES, THE CONSTITUTION AND THE LAW OF THIS COURT.

There can be no doubt that the contentions of the Individual Respondents with respect to this section are patently frivolous. Petitioner has said far more than that it was "treated unfairly" because the Board refused to permit written or oral argument. What Petitioner has stated is that the Board consciously and wilfully ignored the clear language of the Statute and its own Rules. That language grants a defendant the absolute right to at least file a written brief and requires that the Board must consider that brief and oral argument before it rules. The Board has no "discretion" to disregard those clear mandates. The right to make argument after the close of the hearing is one which cannot be denied under the Statute, the Board Rules or the law of the land.

And notwithstanding the innuendos advanced by the Individual Respondents, Petitioner pointed out to this Court that the facts in "second *Morgan*" (*Morgan* v. *United States*, 304 U. S. 1 (1938)) differed from those at bar. Nonetheless, that case is clear authority for the proposition that the actions of the Board below denied Fry due process, even without reference to the unequivocal language of the Statute and Rules. Petitioner respectfully requests that this Court should grant review.

CONCLUSION.

Petitioner respectfully prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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